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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 153

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit, reversing a temporary injunction granted by the United States District Court for the Northern District of West Virginia, and remanding the cause to that court with directions to dissolve the injunction and dismiss the plaintiff's bill.

The bill was filed by the Lambert Run Coal Company against the Baltimore & Ohio Railroad Company in the Circuit Court of Marion County, West Virginia, and was removed on petition of the defendant to the United States District Court for the Northern District of West Virginia. The complainant, a corporation of West Virginia, is engaged in operating a coal mine located on

and served by the defendant's railroad in that state, and filed the bill to enjoin the defendant from continuing certain practices in the distribution of cars to coal mines served by it, alleging that such practices were directly prohibited by the Interstate Commerce Act and that their continuance would cause irreparable injury to the plaintiff for which it had no adequate legal remedy.

On June 29, 1920, the cause came on to be heard in the District Court for the Northern District of West Virginia on the motion of the plaintiff for a temporary injunction and the motion of the defendant to dismiss the bill. The District Court overruled the latter motion and granted a temporary injunction in accordance with the prayer of the bill. The defendant appealed from this order to the Circuit Court of Appeals for the Fourth Circuit with the result indicated in the first paragraph of this statement.

The plaintiff's claim is based on a portion of paragraph (12) of Section 1 of the Interstate Commerce Act. Paragraph (12) was made a part of the Interstate Commerce Act by Section 402 of the Transportation Act, 1920, and reads as follows:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United

States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

The bill of complaint alleges that plaintiff owns and operates a bituminous coal mine in West Virginia having a switch connection with defendant's railroad upon which it is wholly dependent as the initial carrier of all shipments of its coal. (Pr. Rec., 8.)

It is further alleged that defendant has established ratings of the plaintiff's mine and all other mines served by it for the purpose of determining the distribution of coal cars among such mines. These ratings are based on the productive capacity of the respective mines when working full time, and are determined for each month by the performance of the mine for the preceding month under rules adopted by defendant which are set forth in Exhibit A attached to the bill. (Pr. Rec. 27-31.) The rating of plaintiff's mine at the commencement of this suit was 11.5 fifty-ton cars per day. (Pr. Rec., 9.)

The bill raises no question as to the rules by which these ratings are determined or as to the justice or reasonableness of the particular ratings in force at the time the suit was commenced. The claim of the plaintiff is that, having established just and reasonable mine ratings in accordance with the statute, the defendant neglects and refuses during periods of car shortage to apply these ratings and to count cars furnished to or used by any mine for transportation of coal against that mine as the statute requires.

The allegations of the bill relative to this claim are as follows:

The defendant has maintained ratings of the mines served by it for many years. (Pr. Rec., 9.) Prior to the

assumption by the United States of the control of the defendant's railroad and other railroads it was a general practice of many railroads, during periods of coal car shortage to deliver to mines furnishing railway fuel coal, cars for transportation of such coal in excess of the number of cars which such mines would have received if the available supply of cars had been distributed proportionately to the ratings of the several mines served by the particular carrier, a practice which is commonly known as the practice of assigning cars. Under federal control this practice was continued until it came to the attention of the United States Fuel Administrator, who thereupon made representations to the Director General of Railroads that its effect was disastrous to the coal industry and to the consuming public, and urged its discontinuance and the adoption of the method of distributing cars in accordance with mine ratings. Upon the refusal of the Director General to accede to this representation, the matter was submitted to the President and considered by him in conference with the Director General and the United States Fuel Administrator.

As a result of this conference, an order was issued by the United States Railroad Administration, dated July 1, 1918, reciting that the assignment of cars for railway fuel had been discontinued effective June 24, 1918, on the Pennsylvania Railroad and the defendant's railroad, and their short-line connections, and ordering its discontinuance on all other lines in the Eastern, Allegheny and Pocahontas Regions; and on July 6, 1918, similar action was taken with reference to all other railroads under federal control. Previously to the issuance of these orders, and as a result of the same conference, the Fuel Administrator had issued a statement and order, reducing all maximum Gov-

ernment prices for bituminous coal ten cents per ton, and stating that this reduction was made possible by the reduction in the cost of production consequent upon the adoption of the plan of equal car supply to the mines. (Paragraph 7, Bill of Complaint, Pr. Rec., 11-17.)

The system of car distribution so established remained in force on all railroads under federal control until the passage of the Transportation Act and return of the railroads to private control on February 29, 1920, and was observed by the defendant after the termination of federal control and until April 15, 1920. (Pr. Rec., 17.)

For many weeks prior to and at the time of the filing of the bill there had been an acute shortage of cars for the transportation of coal on defendant's railroad (Pr. Rec., 9-10) and on or about April 15, 1920, the defendant commenced to assign to certain mines, not including plaintiff's mine, cars for transportation of railway fuel coal in excess of the number which such mines would have received if their mine ratings had been applied, and to distribute to plaintiff's mine fewer cars than its share according to its rating (Pr. Rec., 17, 10).

This method of distribution, which the bill charges to be in violation of said paragraph (12), Section 1 of the Interstate Commerce Act was effected pursuant to certain car distribution rules issued by defendant which are set forth in Exhibit A. (Pr. Rec., 10.)

These rules are as follows (Pr. Rec., 34):

> "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio et al.* v. *H. V. R'y Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.
>
> 9. If the number of assigned cars placed at a

mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

The bill further alleges that the plaintiff is informed and believes that the shortage of coal cars will continue for a long period, that it has attempted to induce and persuade the defendant to discontinue the distribution of coal cars in the method above described, but the defendant has refused to abandon the practice and threatens and intends to continue it, and will do so unless restrained by the court.

The facts stated in the bill as to irreparable injury may be summarized as follows:

Bituminous coal tends to deteriorate when stored at the mines and is subject to serious danger of spontaneous combustion. At many mines it cannot be stored because of the contour of the land about the mouth of the mine. Hence bituminous coal mines cannot be operated unless cars are available in which to load and ship coal as and when it is mined. (Rec., 17-18.)

The maintenance of a bituminous coal mine in condition for operation involves a large overhead expense which accrues continuously whether the mine is in operation or not. This expense includes interest, taxes, insurance and depreciation, the salaries and wages of the sales organization, office employees, mine superintend-

ent, engineers and other necessary permanent employees, the expense of ventilating the mine and keeping it clear of water, and of feeding and caring for animals. The amount of this constant overhead cost which must be borne by each ton of coal mined necessarily increases as the tonnage mined decreases, and a reduction of car supply necessarily involves an increase in the unit cost of production. (Rec., 18.)

The reduction in the tonnage of coal produced also impairs the ability of the producer to fill contracts and supply customers and therefore tends to destroy the good will of his business and impair his credit. (Pr. Rec., 19.)

The principal incentive of mine laborers to continue in the employment of a particular mine is the regularity of the employment which it offers, and as between mines in the same or neighboring districts the best and most efficient labor will go to and remain at the mines with the smallest proportion of idle time. Mines with the greater proportion of idle time must therefore operate, when they can operate at all, with a depleted force of laborers of the least reliable and efficient grade. (Pr. Rec., 18-19.)

The plaintiff was entitled under its mine rating to 140.14 fifty-ton cars for the transportation of coal during May. Under the method of distribution used by defendant as set out in the bill it received only 108 cars. (Pr. Rec., 21.)

By reason of the general shortage of cars and the resulting shortage of bituminous coal, there had been during all of the period since April 15, 1920, a market for coal in which plaintiff could have sold at a profit all coal which its mine was capable of producing when running at its full capacity, and it was at all times ready, willing

and able to load all cars to which it was entitled under its rating with coal from its mine and could and would have disposed of such coal at a profit. (Pr. Rec., 20-21.)

Plaintiff is unable to store coal at its mine both because of the danger of spontaneous combustion and because of the contour of the land around its mine and is therefore compelled to cease mining coal when cars are not available, and during such periods it incurs all the overhead expenses above referred to. The result of the failure to supply plaintiff with its full share of cars during May was to increase the amount of this overhead chargeable to each ton of coal produced during that month by at least 19.5 cents. (Pr. Rec., 21.) In addition to this fixed overhead expense, the plaintiff was put to great expense in endeavoring to retain its employees and prevent the disruption of its working force, by giving its employees work not connected with the mining of coal from which it does not receive a pecuniary return commensurate with the expenditure. (Pr. Rec., 20.) The average cost of producing a ton of coal at plaintiff's mine in March, 1920, before the defendant resumed the practice of assigning cars for railway fuel coal was $2.36. The defendant commenced to assign cars for railway fuel on April 16, 1920, and in May the average cost of production at plaintiff's mine had risen to $3 per ton. (Pr. Rec., 21-22.)

While the plaintiff is suffering these injuries its competitors who receive assigned cars are relieved entirely or to a large extent even of the consequences of the general car shortage. They are enabled to operate their mines steadily, maintain their full productive capacity, keep the per ton cost of production down, build up and maintain the good will of their business, attract and keep labor of the best quality and thus to obtain a marked

competitive advantage over the plaintiff's mine and other mines served by the defendant which do not receive assigned cars. (Pr. Rec. 19.)

The bill further alleges that the plaintiff's only remedy at law is to bring successive suits for damages against defendant which would result in a multiplicity of suits and great and burdensome costs and expenses, and that a continuance of the unlawful practices of the defendant will result in partial or complete disruption of plaintiff's organization, and great and increasing injury to the property, good will and business of the plaintiff for which no adequate remedy at law exists, so that the plaintiff will continue to suffer such loss and injury unless the defendant is restrained by injunction. (Pr. Rec., 22.)

The bill prays that the defendant be restrained, during any period when the supply of cars for the transportation of coal on its line does not equal the requirements of the mines served by it, from distributing to any such mines more cars than they are entitled to on the basis of their respective ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine, and from distributing to plaintiff's mine a smaller number of cars than it is entitled to on the basis of its rating, and from enforcing its Rules 8, 9, and 10, which are set forth in full *supra*, or any other rules or practices having the same or a like effect; that it be directed to comply with the provision of paragraph (12), Section 1 of the act, and during any period of car shortage, to maintain and apply mine ratings to all mines served by it and to count each and every car furnished to or used by a mine for transportation of coal against that mine, and enjoined from following any rule or practice which will give to any mine served

by it cars for transportation of coal in a number, the ratio of which to the rated capacity of the mine is greater or less than the ratio of the total number of cars available on defendant's line for transportation of coal to the total rated capacity of all mines served by defendant. (Pr. Rec., 24-25.)

On the same day on which the bill was filed the defendant presented its petition and bond for removal to the United States District Court for the Northern District of West Virginia. The petition sufficiently alleged that the plaintiff was a citizen and resident of West Virginia and the defendant was a citizen and resident of Maryland, and also that the suit was one arising under the laws of the United States (Pr. Rec., 38-41), and a transcript of the record was thereafter filed and the case duly docketed in the United States District Court for the Northern District of West Virginia (Pr. Rec., 54). In that court the defendant filed its motion to dismiss and answer. (Pr. Rec., 84-93.)

The answer admits all of the allegations of the bill as to the establishment of mine ratings, the particular rating given to plaintiff's mine, the existence of a car shortage, and the rules of the defendant governing the distribution of cars in times of car shortage. (Pr. Rec., 85-87.)

It does not deny the allegations of the bill as to the preferential assignment of cars to mines shipping railway fuel, or as to the injurious effect of such distribution upon mines not receiving assigned cars. It does not deny the allegation that the rating of plaintiff's mine called for 140.14 cars during May and that the mine received only 108 cars, the allegations as to the increase in cost of producing coal at plaintiff's mine, or any of the allegations relating to the irreparable damage to plaintiff arising from the acts sought to be enjoined.

It admits that prior to federal control it was the defendant's practice to assign cars for railway fuel, and that such practice was abolished under federal control, but alleges upon information and belief that its abolition was not due to representations as to the disastrous effect of the practice upon the coal mining industry, but to the belief of the Fuel Administrator that he could better perform his duties if he had entire control of the distribution of coal. (Pr. Rec., 89, 90.)

It further alleges that the car distribution rules complained of by plaintiff were promulgated in pursuance of a notice to carriers and shippers issued on April 15, 1920, by the Interstate Commerce Commission, a copy of which notice is attached to the answer as "Exhibit B" and reads as follows (Pr. Rec., 105):

"INTERSTATE COMMERCE COMMISSION
WASHINGTON.

April 15, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that Rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the In-

terstate Commerce Commission in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing Rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of Rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. MCGINTY,
Secretary."

The answer also alleges that the Commission's reasons for issuing this notice were stated in its reply to a resolution of the Senate, and the resolution and reply are attached to the answer as exhibits. (Pr. Rec., 94-104.) The resolution consisted of a preamble reciting that the railroads were assuming, under the Commission's notice of April 15, 1920, to make assignments of freight cars in a manner alleged to be prejudicial to the public welfare, and an inquiry as to the Commission's authority in the premises. The Commission's reply is in effect an argument in support of the proposition that the notice is a valid exercise of the Commission's authority and does not conflict with paragraph (12).

The motion to dismiss the bill filed with the answer alleged the following grounds (Rec., 84-85):

"1. That the bill does not state a case within the jurisdiction of the Circuit Court of Marion County or of this court.

2. That it does not appear in said bill that the matters complained of have been complained of to

the Interstate Commerce Commission or that said Commission has taken any action in respect thereof, and that the Circuit Court of Marion County has no jurisdiction in respect of the matters complained of in the bill and this court has no jurisdiction until the matters have been complained of to the Interstate Commerce Commission.

3. That the plaintiff has concealed the fact that the rules complained of are rules of the Interstate Commerce Commission, which fact was within the plaintiff's knowledge, and which fact is a most material and necessary fact for the proper determination of this case.

4. That this bill is a bill to restrain the enforcement, operation and execution of an order of the Interstate Commerce Commission, and United States of America and the Interstate Commerce Commission are necessary parties to this case.

5. That said bill is without equity."

When the cause came on for hearing in the District Court the defendant objected to the hearing of the motion for the injunction except by three judges, and moved that the sitting judge call to his assistance two other judges, of whom one should be a circuit judge, to hear said motion in accordance with the Act of Congress of October 22, 1913. The objection and motion were both overruled, and the hearing proceeded on the motion for a temporary injunction and the defendant's motion to dismiss. (Pr. Rec., 107.) In support of the motion for injunction, the plaintiff presented, in addition to the sworn bill of complaint, the affidavits of H. A. Garfield, former United States Fuel Administrator (Pr. Rec., 80-83), R. V. Norris and James H. Allport, former members of the Engineers' Committee of the United States Fuel Administration (Pr. Rec., 71-80), and of Samuel D. Brady (Pr. Rec., 55), Brooks Fleming, Jr. (Pr. Rec., 59), Claude M. Stebbins (Pr. Rec., 61), Cletus H. Jenkins (Pr. Rec., 64), and James M. Orr (Pr. Rec., 67).

Dr. Garfield's affidavit states the facts and circumstances attendant upon the prohibition of the use of assigned cars for railway fuel by the Railroad Administration, and the injury to the public resulting from the assigned car practice which led him to propose the taking of that step. The affidavits of Messrs. Allport and Norris state the results of an investigation made by the Engineers' Committee of the Fuel Administration into the increase in the cost of coal production caused by reduction in output. The remaining affidavits relate either to the concrete effects in the car shortage existing when the bill was filed, of the application of the defendant's car distribution rules which are complained of in this case, or to the consequences of the assigned car practice in general.

The ultimate facts which these affidavits tend to prove are alleged in the bill of complaint and have already been stated. As the bill itself was tendered and received as an affidavit in support of the application for the temporary injunction, and as no counter affidavits were filed and no controversy exists as to any material facts, it seems unnecessary to make further reference to these affidavits at this time.

The defendant based its motion to dismiss the bill and its opposition to the motion for a temporary injunction on the following grounds:

It contended (1) that the practice of assigning cars for railway fuel as complained of in the bill was not in conflict with paragraph (12), Section 1, of the Interstate Commerce Act; (2) that the method of distribution of cars for the transportation of coal was within the jurisdiction of the Interstate Commerce Commission and that no action would lie against a carrier in respect thereof unless complaint had first been made to the Commission

and it had passed on such complaint; (3) that defendant had been directed by the terms of the Notice to Carriers and Shippers issued by the Interstate Commerce Commission, and hereinabove set forth, to adopt the method of car distribution attacked by the bill, and that the making of this direction by the Commission was a lawful exercise of power conferred on it by paragraph (15), Section 1, of the Interstate Commerce Act, which reads as follows:

"(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority

in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may detemmine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

On June 29, 1920, the District Court overruled the defendant's motion to dismiss and granted a temporary injunction substantially in accordance with the prayer of the bill. (Pr. Rec., 107-109.) From this order the defendant appealed to the United States Circuit Court of Appeals for the Fourth Circuit.

On the argument of this appeal, Mr. Blackburn Esterline, representing the Attorney General, and Mr. P. J. Farrell, chief counsel for the Interstate Commerce Commission, appeared, and were heard as *amici curiae* in opposition to the temporary injunction from which the appeal was taken, and in support of the claim of defendant that the court should reverse the injunction and order the dismissal of the bill. (Pr. Rec., 123.)

The Court of Appeals handed down its opinion on August 11, 1920. (Pr. Rec., 123-130.) It held that paragraph (12), Section 1 of the Interstate Commerce Act required the distribution of coal cars in accordance with mine ratings during periods of coal car shortage, and that the method of distribution prescribed by the Commission in its order of April 15, 1920, and followed by the defendant did not conform to this requirement. But it also held that in the emergencies specified by paragraph (15), the Interstate Commerce Commission had authority under clause (d) of that paragraph to give directions inconsistent with the

car shortage provision of paragraph (12), and that the order of April 15, 1920, was a valid exercise of this authority, and it therefore entered the decree from which this appeal is prosecuted, reversing the temporary injunction, and remanding the cause to the District Court with directions to dissolve the injunction and dismiss the bill. (Pr. Rec., 131.)

On this record, the appellant contends:

1. That under paragraph (12), Section 1 of the Interstate Commerce Act, during any period when the supply of cars available for transportation of coal is not equal to the requirements of the mines served by a carrier, the carrier is bound to distribute the cars which are available in strict accordance with the respective ratings of the mines served by it.

2. That the Interstate Commerce Commission has no power or authority to relieve the carriers from the obligation to conform to this provision, or to sanction or prescribe any rule for the distribution of coal cars other than that prescribed by paragraph (12), and the notice dated April 15, 1920, does not justify the failure of defendant to conform to the requirement of paragraph (12).

3. That the violation by the defendant of the terms of paragraph (12) and the resulting injury to the plaintiff alleged in the plaintiff's bill, constituted a case within the equity jurisdiction of either a state or a federal court and the Court of Appeals erred in ordering the bill to be dismissed.

4. That the District Court was authorized to grant the temporary injunction which the Court of Appeals reversed, and the Court of Appeals erred in reversing said injunction.

Specification of Errors.

I.

The Circuit Court of Appeals erred in entering the decree dated the 12th day of August, 1920, in this cause.

II.

The Circuit Court of Appeals erred in reversing the temporary injunction awarded on June 30, 1920 by the United States District Court for the Northern District of West Virginia in said cause.

III.

The Circuit Court of Appeals erred in remanding said cause to the United States District Court for the Northern District of West Virginia, with directions to dissolve said injunction and dismiss the bill of complaint in said cause.

IV.

The Circuit Court of Appeals erred in ordering the dismissal of the bill of complaint in said cause.

V.

The Circuit Court of Appeals erred in holding that the notice of the Interstate Commerce Commission, dated April 15, 1920, set up in the answer of the defendant to the bill of complaint in said cause, was a valid exercise of a power vested by law in said Interstate Commerce Commission.

BRIEF.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PARAGRAPH (12), SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THE STRICT OBSERVANCE OF MINE RATINGS IN THE DISTRIBUTION OF CARS FOR THE TRANSPORTATION OF COAL DURING A PERIOD OF CAR SHORTAGE

Paragraph (12), Section 1, of the Interstate Commerce Act, provides that during any period when the supply of cars available for transportation of coal does not equal the requirements of the mines served by a carrier:

> "It shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense and the carrier, receiver or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense which may be recovered in a civil action brought by the United States."

We contend that the direction to apply mine ratings, coupled with the requirement that each and every car furnished to or used by a mine for transportation of coal shall be counted against that mine, is susceptible of but one meaning—that all cars delivered to coal mines during periods of car shortage are to be distributed among the mines in proportion to their respective rated capacities.

The Court of Appeals so held, and rejected the contention of defendant that paragraph (12) was merely declaratory of the rule established by the Commission in

Railroad Commission of Ohio v. *Hocking Valley Railway Company*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Company*, 13 I. C. C. 451, commonly referred to as the rule in the *Traer* case, and did not require the distribution of cars in accordance with mine ratings.

The holding of the Court of Appeals was correct for the following reasons:

First. The view that paragraph (12) did not change the rule in the *Traer* case cannot be maintained for the reason that the language of paragraph (12) is wholly irreconcilable with that rule.

The rule in the *Traer* case requires coal cars to be classified as assigned and unassigned cars and provides a different rule of distribution for each class. The language of paragraph (12) unmistakably establishes a uniform rule of distribution applicable alike to every mine and to each and every car furnished to or used by a mine for transportation of coal, and is therefore conclusive against the view that Congress intended to perpetuate the rule in the *Traer* case.

Sturges v. *Crowninshield*, 4 Wheat. 122.
United States v. *Goldenberg*, 168 U. S. 95.
Hamilton v. *Rathbone*, 175 U. S. 414.
Caminetti v. *United States*, 242 U. S. 470.
See Argument, *infra*, pp. 32-46.

Second. The assigned car practice was productive of gross evils both to coal operators who did not receive assigned cars and to the coal consuming public, and the legislative history of paragraph (12) demonstrates that it was enacted for the specific purpose of curing these evils by prohibiting the use of assigned cars which had been sanctioned by the rule in the *Traer* case.

See Argument, *infra*, pp. 46-62.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PARAGRAPH (15) CONFERRED AUTHORITY ON THE COMMISSION TO RELIEVE THE CARRIERS OF THE OBLIGATION TO CONFORM TO PARAGRAPH (12) OR TO PRESCRIBE A DIFFERENT RULE OF CAR DISTRIBUTION.

The decree of the Court of Appeals reversing the injunction and ordering the dismissal of the bill was based upon the view that the Commission was authorized by paragraph (15) to relieve the carriers of the obligation to conform to paragraph (12), and to prescribe a different rule, and that its notice of April 15, 1920, was a valid exercise of that power.

Paragraph (15) provides that when the Commission is of opinion that "shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country" it may, without complaint, notice or hearing:

(a) Suspend rules, regulations and practices with respect to car service.

(b) Give just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles.

(c) Require joint or common use of terminals.

(d) Give "directions for preference or priority of transportation, embargoes or movement of traffic under permits."

Defendant contended in the Court of Appeals that assuming paragraph (12) to require the ratable distribution of cars during a shortage, the Commission's notice was justified under clauses (a) and (b) of paragraph (15).

The Court of Appeals rejected this view but held that the notice was a valid "direction for preference or priority in transportation" under clause (d) of paragraph (15).

We contend that neither the contention of the defendant nor the view taken by the Court of Appeals can be maintained, for the following reasons:

First. The sole purpose of paragraph (15) is to enable the Commission to control the use by carriers of their equipment and facilities in the movement of freight, for the purpose of preventing or remedying car shortages and congestion of traffic, and the method of distributing cars among shippers during the existence of a shortage is wholly outside its scope and purpose.

Neal v. *Clark*, 95 U. S. 704.
Virginia v. *Tennessee*, 148 U. S. 503.
United States v. *Stever*, 222 U. S. 167.
United States v. *Salen*, 235 U. S. 237.
See Argument, *infra*, pp. 65-81.

Second. Even if paragraph (15) should be construed as conferring on the Commission authority over the distribution of cars among shippers, such authority does not extend to the making of directions or orders inconsistent with the express statutory requirement of paragraph (12).

United States v. *Symonds*, 120 U. S. 46.
Morrill v. *Jones*, 106 U. S. 466.
United States v. *United Verde Copper Company*, 196 U. S. 207.
Williamson v. *United States*, 207 U. S. 425.
United States v. *Grimaud*, 220 U. S. 506.
Railroad Commission of Nevada v. *Southern Pacific Company*, 21 I. C. C. 329, 341.
See Argument, *infra*, pp. 82-97.

Third. Paragraph (15) should not be construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12) or to give directions inconsistent with that provision, because, if it is so construed, it involves an invalid delegation of legislative power.

Field v. *Clark,* 143 U. S. 649.
Buttfield v. *Stranahan,* 192 U. S. 470.
Union Bridge Company v. *United States,* 204 U. S. 364.
McCullough v. *Virginia,* 172 U. S. 102, 112.
United States v. *Delaware & Hudson Railway Company,* 213 U. S. 366, 407.
See Argument, *infra,* pp. 97-103.

Fourth. The purpose and intent of Congress with reference to the transportation of coal evidenced by the enactment of paragraph (12), will be wholly defeated if paragraph (15) is construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12), or to give directions inconsistent with that provision.

See Argument, *infra,* pp. 103-106.

III.

THE PLAINTIFF IS ENTITLED TO RELIEF IN EQUITY EITHER IN A STATE OR FEDERAL COURT AGAINST THE CONTINUED VIOLATION BY APPELLEE OF THE CAR SHORTAGE PROVISION OF PARAGRAPH (12) AND THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE TEMPORARY INJUNCTION AND ORDERING THE DISMISSAL OF THE BILL.

1. The Circuit Court erred in ordering the dismissal of the plaintiff's bill.

It is well settled that one injured by reason of a car-

rier's violation of a provision of the Interstate Commerce Act may maintain an action based on such violation in either a state or a federal court, when the question of the carrier's liability does not require the determination of any question of reasonableness or unjust discrimination.

Pennsylvania Railroad Company v. *International Coal Company*, 230 U. S. 184.
Mitchell Coal & Coke Company v. *Pennsylvania Railroad Company*, 230 U. S. 247.
Pennsylvania Railroad Company v. *Puritan Coal Mining Company*, 237 U. S. 121.
Pennsylvania Railroad Company v. *Sonman Shaft Coal Company*, 242 U S. 120.

The case at bar is clearly within the rule established by these cases. The sole ground upon which the plaintiff claims the right to relief is that defendant has refused to apply mine ratings in the distribution of cars and to count each and every car against the mine to which it is furnished or which uses it, as required by paragraph (12). The determination of this claim obviously does not involve any question of reasonableness or discrimination.

If, as we contend, the Commission had no power or authority to relieve the carriers of their obligation to obey the car shortage provision of paragraph (12) or to prescribe a different method of distribution, the Commission's notice of April 15, 1920, could not affect the plaintiff's right to a distribution of cars in accordance with paragraph (12) or oust the jurisdiction of the courts to adjudicate that right.

See *Pennsylvania Railroad Company* v. *International Coal Company*, 230 U. S. 184, at page 197.

See Argument, *infra*, pp. 107-117.

2. The Court of Appeals erred in reversing the temporary injunction.

See Argument, *infra*, pp. 118-119.

IV.

THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE DECREE OF THE CIRCUIT COURT OF APPEALS.

United States Fidelity and Guaranty Company v. *Bray*, 225 U. S. 205.

Louisville & Nashville Railroad Company v. *Cook Brewing Company*, 223 U. S. 70.

Spreckels Sugar Refining Company v. *McClain*, 192 U. S. 397.

Northern Pacific Company v. *Amato*, 144 U. S. 465.

See Argument, *infra*, pp. 120-122.

ARGUMENT.

The controversy in the case at bar involves the meaning and effect of paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act in connection with the distribution of coal cars during periods of car shortage. We are convinced, and shall maintain, that these statutory provisions speak plainly and unequivocally for themselves and that no historical investigation is necessary to their interpretation. Our opponents, however, have argued this case in the lower courts upon the theory that the statute is merely declaratory of pre-existing practices and rules, and will doubtless do so in this court, and as our discussion of the position they have taken will require frequent references to earlier phases of the problem, we have thought it advisable to preface our argument by a brief statement of the various stages through which coal car distribution has passed, as shown by reported decisions and by the record in this case.

Prior to 1907, the distribution of coal cars during periods of car shortage was regulated by the carriers themselves, and the general practice was to divide cars for the transportation of coal into two classes, one consisting of so-called privately owned cars and cars for the transportation of locomotive fuel, called assigned cars, and the other consisting of all other available cars and called unassigned cars. All coal mines were rated according to productive capacity, and during car shortages unassigned cars were distributed among the mines in proportion to their respective ratings. Assigned cars on the other hand were delivered to the mines to which they were consigned without regard to ratings and the mines receiving assigned cars were allowed their full *pro rata* shares of unassigned cars in addition.

Complaints were made to the Commission that this practice resulted in undue preferences contrary to the prohibitions of Section 3 of the Interstate Commerce Act. In two cases—*Railroad Commission of Ohio* v. *Hocking Valley Railway Company*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Company*, 13 I. C. C. 451, the Commission sustained these complaints, and prescribed a new rule.

This rule did not change the classification of cars, nor did it place any limitation on the number of assigned cars which might be delivered to a mine. In fact the Commission expressly held that all assigned cars must be delivered to the mine to which they were consigned. The sole change made by the Commission in the existing practice was to prohibit mines receiving assigned cars from sharing the unassigned cars ratably with the mines which received no assigned cars. In other words, under the Commission's ruling a mine receiving assigned cars equaling or exceeding in number the cars it would have received if all cars had been distributed according to mine ratings could receive no unassigned cars. If the assigned cars received by a mine were fewer in number than its rating called for, it was entitled to unassigned cars sufficient to make up that number.

The rule thus established is sometimes referred to as if it required assigned cars to be counted both as a part of the stock available for distribution, and also against the distributive shares of the mines receiving them. This is inaccurate and misleading. In applying the rule, both assigned and unassigned cars were provisionally pooled, and the distributive shares of the mines were tentatively ascertained as if all mines were to share in the pool according to their respective ratings. The assigned cars consigned to each mine which was to receive assigned cars were then counted and in any case in which

the number so consigned to a mine equaled or exceeded the distributive share tentatively ascertained for that mine, that mine, and the cars consigned to it were eliminated from consideration in the general distribution, and the remaining cars were distributed among the remaining mines in accordance with the ratings of such mines.

It will be observed that the rule involved two countings. All assigned cars were included in the first count, but that was made for the sole purpose of determining what mines and how many assigned cars should be eliminated from the *pro rata* distribution. The second counting included only the cars not eliminated as a result of the first counting, and was made for the purpose of insuring the receipt by each mine included in the general distribution of its ratable share and no more. To say that these cars were counted against the distributive share of the mines receiving them is to use an expression easily understood, and entirely appropriate to the procedure of a ratable distribution. Under the Commission's rule some assigned cars might be included in this count, since, if the assigned cars consigned to a mine were fewer in number than its distributive share, such cars were included in the *pro rata* distribution, but the general statement that under the Commission's rule assigned cars were counted against the distributive share of the mine inevitably suggests that the cars which were eliminated as a result of the first count were also ratably distributed and cannot fail to cause confusion.

This rule, commonly known as the rule in the *Traer* case, remained unchanged until about six months after the railroads passed into the control of the Government, when the United States Fuel Administrator made representations to the

Railroad Administration and ultimately to the President that the preference in car supply which it afforded to mines supplying locomotive fuel was productive of serious injury to the public interest because of its effect upon the production of coal and the price paid for it by the general public. The result of the Fuel Administrator's action was that in June and July, 1918, new rules were put in force by the Railroad Administration on all railroads serving coal mines. These rules eliminated railway fuel cars from the class of assigned cars, and thereafter and until the termination of federal control, railway fuel mines were allowed no preference in the matter of car supply.

While the termination of federal control was under consideration in Congress the matter of coal car distribution was brought to the attention of that body, with the result that paragraph (12) was incorporated in Section 1 of the Interstate Commerce Act by Section 402 of the Transportation Act. The Transportation Act became effective February 28, 1920. On March 2, 1920, the Interstate Commerce Commission issued a recommendation to the carriers that the coal car distribution rules of the Railroad Administration be retained until experience should demonstrate that other rules would be more effective. On April 15, 1920, it issued the notice relied on by the defendant in this case directing the railroads to substitute for the Railroad Administration rules, the assigned car practice sanctioned by the *Hocking Valley* and *Traer* cases, and it was the action of the defendant claimed to be pursuant to this notice which brought about the institution of the present suit.

I.

PARAGRAPH (12), SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THE STRICT OBSERVANCE OF MINE RATINGS IN THE DISTRIBUTION OF CARS FOR THE TRANSPORTATION OF COAL DURING A PERIOD OF CAR SHORTAGE, AND THE METHOD OF DISTRIBUTING CARS ADOPTED BY THE DEFENDANT, KNOWN AS THE ASSIGNED CAR PRACTICE, IS A VIOLATION OF THIS STATUTORY PROVISION.

Paragraph (12), Section 1 of the Interstate Commerce Act provides that during any period when the supply of cars available for the transportation of coal does not equal the requirements of the mines served by a carrier:

> "It shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

There is but one word in this provision which can possibly call for explanation, and as to the meaning of that word there is no controversy in this case. The "rating" of a bituminous coal mine is its daily productive capacity ascertained and announced by the carrier and ordinarily expressed in terms of fifty-ton cars. A carrier makes ratings of the mines served by it for the sole purpose of enabling it to prorate the available cars among such mines during periods of car shortage. At the time of the adoption of paragraph (12) and for many years prior thereto, such mine ratings had been an essential part of the system of car distribution of every common carrier by railroad which served bituminous coal mines.

When this is understood, the provision above quoted requires no further interpretation. The direction to apply mine ratings, coupled with the requirement that each and every car used by or furnished to a mine for transportation of coal shall be counted against that mine, is susceptible of but one meaning—that all cars delivered to coal mines during car-shortage periods are to be distributed among the mines in proportion to their respective rated capacities. The legislative intention to enforce this strict observance of mine ratings could not have been more plainly and forcibly expressed.

This view of the meaning of paragraph (12) was accepted in the instant case not only by the District Court but by the Court of Appeals. If it is correct, the practice followed by defendant and authorized by its car distribution rules, of disregarding mine ratings in the distribution of assigned cars obviously does not conform to the statute. There is no controversy as to this point. The Court of Appeals expressly so held, and based its decision that the bill should be dismissed solely on the theory that the Interstate Commerce Commission had authority under paragraph (15) of Section 1 to prescribe a different method of car distribution from that prescribed by paragraph (12) and that its notice of April 15, 1920, was a valid exercise of this authority. The defendant, however, while it admits that its practice does not conform to this construction of paragraph (12), questions the construction, and contended in the Court of Appeals that paragraph (12) did not require the application of mine ratings in the distribution of assigned cars, and that its practice in that regard was not in conflict with the statute.

This contention acquires its principal claim to consideration from the fact that it is based upon an official statement by the Interstate Commerce Commission which

was attached to the defendant's answer to the bill of complaint and is therefore a part of the record in this case. (Pr. Rec., 94-104.) This statement was made by the Commission in reply to a resolution of the Senate inquiring by what authority the Commission had issued its order of April 15, 1920. It reviews at some length the history of the assigned car practice, and the establishment of the rule in the *Traer* case, and refers to the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, in which this court held that the establishment of that rule was within the jurisdiction of the Commission. It also suggests that the abandonment of the use of assigned cars for railway fuel during federal control was followed by confiscations of coal by the railroads, and states that no definite rule or practical plan to keep the railroads supplied with fuel except by the use of assigned cars has ever been suggested by any of the parties in interest; and it states its conclusion as to the effect of paragraph (12) as follows (Pr. Rec., 103):

> "The Commission is of opinion that paragraph (12) of Section 1 of the Interstate Commerce Act does not change the rule of law laid down in the *Hocking Valley* and *Traer* cases, *supra*. The paragraph states in statutory form that which had heretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States."

As to this proposition we say:

First. The view of the Commission that paragraph (12) did not change the rule in the *Traer* case cannot be maintained for the reason that the language of paragraph (12) is wholly irreconcilable with that rule.

Second. The purpose and intent of Congress in enacting paragraph (12), as shown by the situation existing at the time of its adoption and by its legislative history,

was not, as the Commission suggests, to state the rule in the *Traer* case in statutory form, but on the contrary to prohibit the use of assigned cars as sanctioned by that rule.

1. The view of the Commission that paragraph (12) did not change the rule in the Traer case cannot be sustained, for the reason that the language of paragraph (12) is absolutely irreconcilable with that rule.

The reply made by the Commission to the Senate resolution does not discuss the language of paragraph (12), but attempts have been made to reconcile that language with the Commission's view that it does not change the rule in the *Traer* case, by counsel for defendant, and also by the United States District Court for the Northern District of Alabama in the case of *Corona Coal Company* v. *Southern Railway Company*, 266 Fed. 726, in which an injunction against the assigned car practice was denied.

The theory of defendant's counsel was stated in their brief in the Court of Appeals as follows (page 12):

> "In providing in Section 1, paragraph (12) that the carrier should
>
> 'Count each and every car furnished to or used by any such mine for transportation of coal against the mine'
>
> Congress merely put in statutory form that which the Commission and the United States Supreme Court had judicially determined to be the law.* Prior to 1907 assigned cars were not counted. Any mine receiving them was given, in addition, its full percentage of system or unassigned cars.

*It is misleading to say that the Commission and the United States Supreme Court had "judicially determined" the rule in the *Traer* case to be the law. The Commission does not make judicial determinations, and all that this Court has ever determined with regard to the rule in the *Traer* case was that the Commission was authorized to prescribe it. *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452. The rule has never been anything but a car distribution rule prescribed for the carriers by an administrative decision of the Commission.

> From the following quotations it will be seen that 'count' in connection with car service has acquired a distinct technical meaning, under which cars accounted for under Rules 8, 9 and 10, have been recognized for years as 'counted.' "

It will be observed that this statement makes no reference to that part of paragraph (12) which precedes the provision which it quotes. Paragraph (12) does not merely require the counting of cars. It directs the carriers "to maintain and apply just and reasonable mine ratings *and* to count each and every car," etc. Obviously the counting requirement must be construed so as to harmonize with the direction to maintain and apply mine ratings, and it is one of the conclusive objections to counsel's position on this point that if the language of the counting requirement is construed as they suggest, it squarely contradicts the direction to apply mine ratings.

Rules 8, 9 and 10, which, according to counsel, embody the system of accounting for cars prescribed by the counting requirement of paragraph (12) are set forth in the record. (Pr. Rec., 24.) Rule 8 defines the terms "assigned cars" and "unassigned cars." Rule 9 reads as follows:

> "9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, *equals or exceeds the mine's pro rata share of the available car supply*, it shall not be entitled to any unassigned cars. *The assigned cars, together with the mine's requirements, will be eliminated*, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination."

Rule 10 provides that if the assigned cars delivered to a mine are less than its *pro rata* share, based on a revised percentage, it shall be entitled to enough unassigned cars to make up its *pro rata* share.

In other words, where the assigned cars delivered to a mine exceed its *pro rata* share, that mine is eliminated from the *pro rata* distribution. Its rating is not applied —it is ignored. And while the remaining cars are distributed to the other mines in accordance with their ratings, those ratings are not applied in the sense required by the mandate of the statute. There is no possible ground for holding that the direction to apply mine ratings was made with reference to anything less than "the supply of cars available for such service," *i. e.*, the transportation of coal, previously mentioned in paragraph (12), and when one mine receives more than its *pro rata* share of that supply, all the other mines necessarily receive less than their shares, and none of the ratings is applied.

It is not claimed by counsel that the language used by Congress in regard to the application of mine ratings has acquired any distinct technical meaning in connection with the rule of the *Traer* case, and there is no color for such a claim. The Commission, in the decisions which established the rule in the *Traer* case, did not discuss the subject in terms of the application of mine ratings. This was quite natural for the reason that these decisions were all concerned with the definition of the conditions under which the rating should be ignored. The language in which the unequivocal direction of paragraph (12) that mine ratings shall be applied was couched had, therefore, not only never been associated with the rule in the *Traer* case, but plainly and unmistakably described a procedure wholly inconsistent with that rule.

Hence if the construction suggested by counsel is placed upon the counting requirement of paragraph (12), we have in the same sentence a peremptory mandate to apply mine ratings followed by an equally peremptory command to disregard them. Manifestly the court will

not attribute a technical meaning to the word "count" when the result would be the utter stultification of Congress.

On the other hand, if the car shortage provision is read as a whole and the language is given its ordinary and natural significance, it is clear, consistent and self-explanatory. No one not obsessed with a preconception as to the legislative intent derived from sources other than the language of the statute, could doubt for a moment that the legislative purpose was to enforce the observance of mine ratings and that the requirement for the counting of cars was imposed to further that purpose. The language of that requirement expresses with perfect appropriateness and accuracy, an intention that cars shall be counted against the mines to the end that each mine shall receive the number of cars called for by its rating, and no more, and in the connection in which it was used by Congress we insist that no other construction can be given to it.

This view was clearly and forcibly expressed by the Court of Appeals. The court said (Pr. Rec., 128):

> "The count of each and every car required is not a mere independent futile enumeration; but a count of each and every car furnished or used against the mine *to the end that there should be proportional distribution of all available coal cars resulting in fair and equal opportunity to each mine on the basis of its rating.* Before the enactment of the statute the matter had been controlled by rules, regulations and practices made by railroads or the government railroad administration which had been the subject of much controversy. Evidently the Congress having in view this controversy after full consideration settled the matter *by an imperative enactment against the assigned car rule* in times of ordinary coal car shortage. Thus it appears to us the rules of the Interstate Commerce Commission above set out are not in accord with subdivision 12 of the Transportation Act of 1920, standing alone."

We do not, however, wish to be understood as admitting that the counting requirement of paragraph (12), standing alone, could be construed as embodying the method of accounting for cars required under the rule in the *Traer* case. The conclusive answer to any and every argument that can be advanced in favor of such a construction is that the rule in the *Traer* case recognized two methods of accounting for cars, one applicable to assigned cars, and another, totally different, applicable to unassigned cars, whereas paragraph (12) unmistakably prescribes a single method of counting applicable alike to each and every car used for transportation of coal.

The claim made by counsel in the Court of Appeals that the word "count" had acquired a technical meaning in connection with the rule in the *Traer* case and that this meaning should be given to it in the statute entirely ignores this proposition. Their argument was that the Commission had stated in various opinions, from which they quoted, that the rule in the *Traer* case required all assigned cars to be counted against the distributive shares of the mines receiving them, that the word "count" had thus acquired a technical meaning descriptive of the method of accounting for cars sanctioned by the Commission, and that Congress must be taken to have used the word in this technical sense.

But even if it can be said that the word "count" was used in a technical sense in the cases to which counsel refer, it cannot possibly be claimed that it had that technical significance except when it was used in connection with the counting of assigned cars. Long before the rule in the *Traer* case was ever thought of, unassigned cars were counted against the distributive shares of the mines receiving them in the ordinary straightforward sense of that expression—that is to say each unassigned car was charged against the distributive share of the mine re-

ceiving it for the purpose of insuring a *pro rata* distribution, and unassigned cars continued to be so counted for that purpose after the rule in the *Traer* case was established, and until the enactment of paragraph (12). There was, therefore, never either occasion or excuse for giving any specialized meaning to the word "count" in connection with unassigned cars, and in the passages from the opinions of the Commission referred to by counsel, the Commission was not discussing the distribution of unassigned cars but was concerned exclusively with the special rule it had established with regard to assigned cars.

We do not think it can be said that even in this limited connection, the Commission used the word "count" in a technical sense. It is true, as counsel pointed out in the Court of Appeals, that the Commission frequently said that all assigned cars must be counted against the distributive shares of the mines receiving them. But it is also plain that the Commission recognized that this statement standing alone and unqualified would convey the impression that assigned cars were subject to *pro rata* distribution in the same manner as unassigned cars, since it always took pains to make clear that assigned cars must be delivered to the mine to which they were consigned even though the number so consigned exceeded that mine's distributive share. This requirement is sometimes coupled directly with the counting requirement, the one being stated as a qualification of the other, and sometimes separated from it, but it is always expressly stated in the Commission's opinions as to the assigned car rule. We think an examination of the cases, which we cite in the margin,* indicates that what the Commission

**Rail & River Coal Company* v. *Baltimore & Ohio Railroad Company*, 14 I. C. C. 86.
Hillsdale Coal & Coke Company v. *Pennsylvania Railroad Company*, 19 I. C. C. 356.

had in mind could be more accurately described as a rule that all assigned cars must be counted against the distributive shares of the mines receiving them, subject to a proviso or exception to the effect that all assigned cars must be delivered as consigned, rather than any special or technical meaning of the word "count."

In any event it is clear that the inference as to the construction of the counting requirement of paragraph (12) which counsel seek to base upon these cases is not justified. In fact if they could be said to have any real bearing on the interpretation of paragraph (12) the only inference that could be drawn from them would be, that since Congress had omitted to qualify the requirement imposed by that paragraph that all cars must be counted against the mines, by the proviso, always explicitly insisted upon by the Commission in these cases, that all assigned cars must be delivered according to consignment, Congress intended the counting requirement to be enforced without any such qualification.

But the fundamental objection to counsel's argument on this point is that these cases have no bearing whatever on the interpretation of paragraph (12). That paragraph ignores any division of coal cars into classes and prescribes as plainly as the resources of language permit a uniform rule applicable to each and every such car. What the Commission may have said in discussing a special and exceptional rule which was dependent upon a division of coal cars into classes, and which was applied only to one of those classes, obviously cannot be resorted to as an aid in the construction of this provision.

The theory upon which the learned district judge who decided *Corona Coal Company* v. *Southern Railway Company*, cited *supra*, attempts to maintain the proposition that paragraph (12) does not conflict with the rule in the

Traer case is stated in the opinion in that case as follows (p. 731):

> "An examination of the Transportation Act shows that Congress has not declared, in paragraph 12 or elsewhere, that in a case like the one now here the *pro rata* plan of distribution shall be applied to assigned cars according to mine ratings as in the case of ordinary commercial cars; but the statute says no more than such 'assigned cars shall be counted against the mine receiving them.'"

As to this interpretation of paragraph (12), we say:

Even if the assumption of the court that the counting requirement is not connected with the direction to apply mine ratings is accepted, it is difficult to understand upon what theory the learned judge excluded assigned cars from the operation of the latter provision. It is true that assigned cars are not expressly mentioned. Neither are unassigned cars. The "supply of cars available for such service" is the subject matter of the provision, and "such service" is of course the transportation of coal referred to in the preceding sentence. Obviously a car cannot become an assigned car unless it is available for transportation of coal, and any car available for transportation of coal is within the direction to apply mine ratings.

It is, however, quite impossible to divorce the counting requirement from the direction to apply mine ratings. Congress did not, as the court seems to assume, direct that each and every car used or furnished for transportation of coal should be counted against the mine receiving it, and provide a penalty of one hundred dollars for every car not so counted, for the mere satisfaction of knowing that a highly correct and wholly futile census of coal cars would be taken each day. If the counting of cars required by the statute was not intended as a part of the procedure of applying mine ratings in the distribution

of such cars, the fact that the statute required it must be regarded as the result of an inexplicable aberration on the part of Congress, and if it was so intended then it amounts to an emphatic declaration that each and every car furnished or used for transportation of coal is subject to distribution in accordance with mine ratings.

The theories of counsel for defendant and of the court in the *Corona Coal Company* case have one point in common. They are based on the assumption that Congress intended to perpetuate the division of cars for transportation of coal into two classes, and the application of a different rule of distribution to each class, and inspired by a determination to read this intention into the statute at whatever cost of violence to its language.

That the courts will not lend themselves to this method of dealing with statutes is well settled. No rule of statutory construction is more fundamental than that which requires the legislative intention to be ascertained primarily from the language which the legislature has used. If that is clear and unambiguous, and its practical application involves no absurd or grossly unreasonable consequences, the inquiry is at an end and the sole duty of the court is to enforce the statute according to its terms.

This doctrine has been consistently adhered to, and frequently applied by this court.

A leading case on the subject is *Sturges* v. *Crowninshield*, 4 Wheat. 122, in which Chief Justice Marshall stated the rule as follows (pages 202-203):

> "* * * although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where

> the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

In *United States* v. *Goldenberg*, 168 U. S. 95, the court said (pages 102-103):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; *Holy Trinity Church* v. *United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby*, 7 Wall. 482; *McKee* v. *United States*, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

In *Hamilton* v. *Rathbone*, 175 U. S. 414, the court again laid down the same rule. Mr. Justice Brown, who delivered the opinion, said (page 419):

> "The general rule is perfectly well settled that,

where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Heydon's* case, 3 Fed. Rep. 76; *United States* v. *Freeman,* 3 How. 556; *Smythe* v. *Fiske,* 23 Wall. 374; *Platt* v. *Union Pacific Railroad Co.* 99 U. S. 48; *Thornley* v. *United States,* 113 U. S. 310; *Viterbo* v. *Friedlander,* 120 U. S. 707, 724; *Lake County* v. *Rollins,* 130 U. S. 662; *United States* v. *Goldenberg,* 168 U. S. 95."

The recent case of *Caminetti* v. *United States,* 242 U. S. 470, strikingly illustrates the doctrine. In this case the statute under consideration was the so-called White Slave Traffic Act of June 25, 1910. The statute made it an offense to transport in interstate commerce any woman for the purpose of prostitution or "for any other immoral purpose."

The plaintiff in error sought a reversal of his conviction under the act on the ground that the transportation in which he had engaged was not shown to have been for gain. The title of the act, and its legislative history gave support to the view that it was directed at commercialized vice, and that an immoral purpose which had no commercial element in it was not within the purview of Congress when it enacted the statute.

In affirming the conviction the court stated the general rule as follows (page 485):

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of

the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.* 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421."

Commenting on the contention that the title of the act and the committee report which accompanied the introduction of the bill into the House of Representatives, showed that the evil aimed at was interstate and international traffic in women, the court said (page 490):

"Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. *Blake* v. *National Banks*, 23 Wall. 307, 319; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 42; *Chesapeake and Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 246; *Binns* v. *United States*, 194 U. S. 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308."

The application of the doctrine of these cases in the case of paragraph (12) is plain. The language of the car shortage provision states succinctly and with perfect clearness a single rule of *pro rata* car distribution

applicable alike to all coal cars and to all coal mines. It does not even remotely suggest an intention on the part of Congress that coal cars should be divided into two classes and a different rule of distribution established for each class. The sole inspiration for the claim that any such intention existed is derived from the fact that the Commission had in the past recognized and sanctioned such a distinction. But a question of construction cannot be raised upon such a pretext. A court may enter upon a historical investigation to resolve a doubt as to the meaning of a statute, but the cases cited conclusively establish the principle that the propriety of such an investigation depends upon the existence of a doubt *originating in the language of the statute.* In *Hamilton* v. *Rathbone,* 175 U. S. 414, cited, *supra,* the court said (page 421):

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve,* but not to *create* an ambiguity. If Section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation."

So, in the case of paragraph (12), it is only by reference to the prior decisions of the Interstate Commerce Commission that any color is given to the hypothesis of an intention on the part of Congress to recognize the rule in the *Traer* case. The language which Congress used not only fails to suggest this hypothesis, but unequivocally repels it.

That considerations within the cognizance of Congress when the proposal to legislate as to coal car distribu-

tion was pending amply warranted the view that the public interest required the abolition of the assigned car practice and the establishment of the principle of *pro rata* distribution, and that paragraph (12) was in fact enacted for the express purpose of accomplishing these ends, we shall presently undertake to show. We insist, however, that independently of all extrinsic considerations, paragraph (12) on its face conclusively establishes that such was the legislative intent, and that the court's sole function in the premises is to enforce it according to its terms.

2. The purpose and intent of Congress in enacting paragraph (12), as shown by the situation existing at the time of its adoption, and by its legislative history, was not, as the Commission suggests, to state the rule in the Traer case in statutory form, but, on the contrary, to prohibit the use of assigned cars sanctioned by that rule, and establish the principle of pro rata car distribution.

The contention that paragraph (12) was not intended to disturb the rule in the *Traer* case is based upon the assumption that that rule is so strongly fortified by the approval of the Interstate Commerce Commission, by years of usage, and by every consideration of expediency, that any intention on the part of Congress to do away with it is almost inconceivable. This was the attitude of the chief counsel for the Interstate Commerce Commission and the representative of the Attorney General who appeared as *amici curiae* in the Court of Appeals, and it is clearly reflected in the reply made by the Interstate Commerce Commission to the Senate resolution which appears in the record.

That reply does not discuss the language of paragraph (12). It is concerned chiefly with the history of the assigned car practice, indicates plainly the Com-

mission's view that the limitation put upon that practice by the decisions in the *Hocking Valley* and *Traer* cases was as drastic as practical considerations either required or permitted, and takes it for granted that Congress did not intend to disturb the status of assigned cars as fixed by those decisions.

In the last preceding subdivision of this argument we pointed out that the clear and unambiguous language of paragraph (12) was an insuperable obstacle to the adoption of this view. But we do not feel called upon to leave unchallenged the position strenuously maintained not only on the part of the defendant but by the Interstate Commerce Commission, and the Department of Justice, that paragraph (12) as we insist it must be construed, is a grossly improvident exercise of legislative power.

The injurious results of the assigned car practice to operators who do not receive assigned cars, in loss of profits due to the curtailment of output, loss of good will, injury to credit, reduction in plant efficiency, and inability to compete on equal terms with operators who receive assigned cars, are set forth in the bill and affidavits in this case, and no attempt has been made to controvert this evidence.

The gross incongruity of this tolerated and encouraged preference and discrimination, producing serious and substantial damage to a large class of shippers, in a system of regulation which was primarily intended to prevent discrimination and preferences by carriers in interstate commerce, is obvious, and we believe that the immediate consequences of the assigned car practice to the plaintiff and other shippers of coal similarly situated amply warranted the intervention of Congress.

We shall not dwell upon this point, however, for the

reason that the private losses suffered by coal operators may well be deemed relatively unimportant in the determination of legislative policy toward coal car distribution, in comparison with the injury which the assigned car practice inflicts upon the public.

A serious coal car shortage affects the public directly in two ways—it reduces the current supply of coal till it is insufficient to meet the current demand, and it increases the cost of such coal as is available. The peculiar vice of the assigned car practice is that it enables the consumers who benefit by it, to escape both of these consequences by shifting their legitimate share of the burden of the shortage to other consumers.

The railroads consume approximately one-third of the bituminous coal produced in the United States. Their requirements are, of course, at the peak during the winter months, when car shortages are most likely to occur. Under the rule in the *Traer* case they are protected against any failure in their coal supply on account of a car shortage, since that rule permits them to give to railroad fuel mines a full car supply no matter how acute the general shortage may be. The extent to which the carriers may monopolize the available cars through which the needs of industrial and domestic consumers must be supplied if they are to be supplied at all, is limited only by the carriers' opinion of their own requirements. The result may be and frequently is, that mines not shipping railroad fuel are for all practical purposes shut down for lack of cars at the very time when the needs of their customers are most pressing.

The affidavits in support of the motion for a temporary injunction afford interesting illustrations of this result of the assigned car practice.

The affidavit of the chief clerk of the Northern West

Virginia Coal Operators' Association (Pr. Rec., 62) shows that in June, 1920, the total rated capacity of the 69 mines served by defendant within the district subject to the jurisdiction of its agent at Grafton was approximately 1,559 cars; that on June 12th of that year 744 cars were available for transportation of coal in that district, or about 47 per cent of this total rated capacity, but only 170 cars, or about 11 per cent, were available for commercial shipments, the balance having been distributed as assigned cars.

The affidavit of James M. Orr (Pr. Rec., 67) shows that the Hudson Coal Company, of which he is president, operates four mines served by the defendant. The greater portion of the output of two of these mines was under contract for delivery to various railroads. The other two mines had no railroad fuel contracts. The defendant began to assign cars to the two mines first mentioned early in May, 1920, for loading the railway fuel which the coal company had contracted to deliver, and continued so to assign cars on practically every working day up to June 15th, the date on which the affidavit was sworn to, although the contracts under which this coal was sold made no provision for a preferred car supply. During the same period the other two mines of the affiant had between them but three days on which they could work full time, and their average car supply was about 38 per cent of their requirements. These mines are in the same neighborhood as the mines of the Long Coal Mining Company, which sells its entire output for locomotive fuel, and the mines of that company not only worked full time on practically every working day after the practice of assigning cars for railway fuel was resumed and until the date of the affidavit, but as a rule had empty cars standing at their tipples after the day's work was completed.

The affidavit of Samuel D. Brady (Pr. Rec., 55), president of the Osage Coal Company, operating mines on the Morgantown & Wheeling Railway, states that on that railroad there was an acute shortage of cars from about the middle of January, 1920; that during thirty days prior to April 10, 1920, the mines of the Osage Company received about 41 per cent of their normal car requirements, and other mines which were loading railway fuel and were even then receiving assigned cars, although the Commission's order of April 15, 1920, had not been promulgated, received from 45 per cent to 66 per cent of their normal requirement. During the succeeding thirty days—the Commission's order having been issued in the first week of the period,—the supply of cars received by the Osage mines dropped to 12.24 per cent, while the railway fuel mines received from 29 per cent to 73 per cent.

Obviously it would be the part of wisdom for all consumers to protect themselves against the recurring seasonal shortages of cars by acquiring reserve stocks during the summer months and consumers failing to do so must expect to suffer the consequences of their own neglect. So far as we are advised, however, no reason has ever been given for permitting the railroads which have omitted that obvious precaution to make the private consumer bear the consequences of their negligence as well as his own.

The responsibility for furnishing equipment to move coal rests upon the railroads. They have been permitted to escape liability for the annual coal car shortage on the plea that they cannot reasonably be expected to meet the peak demand since it would involve providing equipment which would be idle the rest of the year. What seems to have been generally ignored is that the railroads themselves, as consumers, share with the other

consumers the responsibility for the seasonal fluctuation in the demand for coal. If the railroads were in the habit of acquiring reserve stocks of locomotive fuel during the spring and summer which would provide for a substantial part of their requirements for the winter, the largest single factor in the production of the annual car shortage would be eliminated.

But so long as the railroads are permitted to use assigned cars in the manner approved by the Commission, they will not take this reasonable precaution. They will continue under that license to intensify the annual car shortage by depending upon a current supply of coal for their winter needs, and they will extricate themselves from the predicament which this improvidence has largely contributed to cause by taking advantage of the rule in the *Traer* case to monopolize the available cars to the prejudice of other consumers.

Regardless of any question of the private interest of the coal operators this consideration alone furnishes a complete justification for legislation against the assigned car practice.

But the advantage which the use of assigned cars gives to the railroads at the expense of other consumers is not confined to an unwarrantable preference in the matter of fuel supply. It also enables them to shift a large financial burden to the private consumers who are compelled to depend on mines which do not receive assigned cars.

It is a fact of common knowledge that bituminous coal mines operate only when cars are available in which to load the coal as it comes from the mines, and a reduction in car supply therefore involves a corresponding reduction in output, together with an increase in the fixed overhead expense chargeable to each ton of coal pro-

duced. Hence the coal mined during a period of car shortage necessarily costs more to produce than an equivalent tonnage produced during a period when the car supply is equal to the normal requirements of the mines. But with the rule in the *Traer* case in force there is no reason why the carrier should bear any part of the burden of this increased cost. Under that rule, the railroad may guarantee a full car supply to any mine whose output it has purchased, regardless of any general shortage, however acute, and if with that guaranty it does not obtain locomotive fuel at prices based on normal production costs, its purchasing agent should be removed for incompetency.

Of course the saving thus made in the cost of production of railway fuel involves an increase in the production costs at mines not favored with assigned cars, whose car supply is reduced below their ratable proportion of the available supply by reason of the preference given to railway fuel mines. The extent to which the burden of the private consumer may be thus increased is indicated by the affidavits of Messrs. Allport and Norris (Pr. Rec., 71-80), who, as engineers of the Fuel Administration, conducted an investigation into the effect of reduced output on cost of production, the results of which are set forth in their affidavits. This investigation was based on the cost reports made to the Federal Trade Commission during 1917 by 73 operations in the New River district of West Virginia. It has been checked by a similar analysis of the costs of nineteen anthracite mines and of a single colliery in Pennsylvania over a period of four years, and in the opinion of Messrs. Allport and Norris is substantially accurate for the whole industry.

These affidavits show that the cost of production increases at a rate in excess of the diminution

of output. If the car supply is 50 per cent below normal an average increase in unit production cost of 41 per cent above normal may be expected. If, however, the withdrawal of assigned cars from the general stock reduces the supply of mines not receiving assigned cars to 25 per cent of their requirements, the cost of production at those mines will be increased by an additional 45 per cent.

It appears from the affidavit of Dr. Garfield (Pr. Rec., 80-83) that this effect of the assigned car practice on the price of coal to the public was a principal reason for his recommendation that the use of assigned cars for railway fuel should be abandoned. He states that he found the conditions surrounding the supply of railroad fuel to be the largest single factor in the price of coal to the public and the supply of labor for the production of coal, and sums up his conclusions as to the effect of the assigned car practice on the price of coal, as follows:

> "The unbalanced situation produced by contracts involving a full assignment of cars inevitably resulted in imposing upon the public a burden, which it would not have otherwise had to bear and which was of considerable magnitude. This was in part due to the fact that as soon as a given mine was compelled by car shortage to fall below a certain production, the per ton cost of operation mounted rapidly, thereby throwing an unwarrantably large burden upon the purchasers of coal, assuming a constant amount representing profit; and partly because of the fact that the prices forced upon the operators by the railroads for railroad fuel were at figures so near to cost that whatever profits were made by the operators were of necessity made from the purchasers of coal other than the railroads." (Pr. Rec., 82.)

His affidavit also affords interesting and persuasive evidence derived from railroad sources as to the extent of the saving made by the railroads at the expense of

the general public by the use of assigned cars. He states that the Railroad Administration resisted the proposal that it should give up the assigned car practice, and assigned as its ultimate reason for this resistance, the fact "that the principle of equal car distribution would throw upon the railroads an additional expense amounting in the aggregate to from $40,000,000 to $60,000,000." This statement related to the situation existing prior to July, 1918. Since then the cost of production of bituminous coal has materially increased, principally because of the increase in wages awarded by the Bituminous Coal Commission in 1920, and it is safe to assume that from $60,000,000 to $80,000,000 would now more nearly represent the profit which the railroads make at the expense of other coal consumers by the use of assigned cars.

A further injurious result of the assigned car practice noted by Dr. Garfield is the creation of unrest and dissatisfaction among mine workers. It is notorious that one of the prime causes of the wasteful and expensive labor troubles in the coal industry is irregularity of employment. This condition is, of course, intensified by the use of assigned cars. On this point Dr. Garfield said:

> "Operators having contracts for railroad fuel were able to ship coal substantially every day in the week; while other operators in the same field having no contracts for railroad fuel were compelled to close down their mines for lack of cars. This unbalanced condition threw large numbers of mine workers out of employment in the mines that were not furnishing railroad fuel, while in neighboring operations the labor found satisfactory employment. Affiant found this condition a subject of great and serious complaint among the mine workers, and that, at that particular time, namely, the spring and summer of 1918, it was of first importance to continue operations without suspensions and further that

conditions in the mining fields should be made so satisfactory to labor that the maximum of production could be secured." (Pr. Rec., 81.)

The Bituminous Coal Commission appointed by the President to adjust the wage controversy between bituminous mine workers and operators which had resulted in the 1919 strike in the bituminous coal fields also gave consideration to the assigned car practice, and in its report to the President it recommended (pp. 34-35):

"* * * that, wherever lawful, rules and regulations be issued governing and controlling car distribution between mines, to the end that no particular mine or mines may be permitted to obtain preferential car service through the use by railway purchasing agents, of their power to obtain railway fuel at reduced prices through the guaranteeing of car supply to favored mines or to operators with whom the railway may have fuel contracts.

We make this recommendation because we find that the practice and abuse of car guarantees has militated against the interests of the general public by contributing to the irregularity of operation of mines not having such preferential contracts. At the same time, it has resulted in an unfair competitive advantage to those mines that secured such contracts."

No attempt has hitherto been made in the case at bar to deny that the injurious consequences we have outlined do in fact flow from the use of assigned cars. The justification, and the only justification, which has been offered for the continuance of the practice is the claim that without assigned cars the carriers will not be able to get the fuel necessary to enable them to perform their public duties.

That this is the case is assumed rather than asserted in the reply made by the Commission to the Senate inquiry. The Commission there states that it freely invited the parties interested to suggest a "workable con-

crete plan" for supplying the carriers with fuel, as a substitute for the assigned car rule, and that none was offered, the nearest approach to such a plan being a tentative suggestion that some form of preferential contract for railway fuel could be devised. (Pr. Rec., 104.)

Prior to the passage of the Transportation Act, when the Commission's administrative jurisdiction was uncontrolled by any specific statutory rule applicable to coal car distribution, its opinion as to the expediency of the assigned car rule would not have been subject to review in this court. We submit, however, that it is not conclusive in a controversy as to the construction of paragraph (12).

What, in the Commission's view are the requisites of a "workable concrete plan" for supplying the carriers with fuel?

Is it essential to such a plan that they should be enabled not only to obtain fuel but to dictate the price which they will pay for it, and thereby inflict upon other consumers of coal a loss running to scores of millions of dollars annually?

If the supply of coal, and not an artificial and undue advantage over other consumers in the matter of price, is in fact what the Commission desires to obtain for the carriers, what are the extraordinary conditions in the coal industry which render it impossible for the carriers to obtain coal without also having the power to dictate the price?

The railroads collectively purchase a third of the bituminous coal produced in this country. The principal railroad corporations are individually among the largest purchasers of coal in the United States. Does not this concentrated purchasing power sufficiently guarantee the carriers all reasonable protection in the matter of their

fuel supply and its price without the additional weapon of an unlimited power of arbitrary discrimination in the use of their equipment?

The Commission's reply to the Senate inquiry does not indicate that it has considered these questions. But the circumstances in which paragraph (12) was incorporated in the Transportation Act, 1920, clearly demonstrate that Congress was deeply impressed by the abuses attendant upon the assigned car practice and that paragraph (12) was specifically designed to counteract those evils.

When the return of the railroads to private control came before Congress for consideration, the use of assigned cars for railway fuel had been forbidden by the Railroad Administration. This prohibition was ordered by the President as the direct result of representations made by the Fuel Administration as to the pernicious effect of the assigned car practice on the price and supply of coal to the public and on mine labor. (Pr. Rec. 11-17, 80-83.)

That paragraph (12) was based on this policy of the Railroad Administration and was intended to prevent the recrudescence of the evils of the assigned car system to which the Fuel Administrator had called attention is established by the report of the Committee on Interstate and Foreign Commerce to the House of Representatives. In reference to paragraph (12) this report made the following explanation:

> "The same section makes it the duty of every common carrier, or railroad, 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty

of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.' *During Federal control such a rule has been followed by the Director General and the committee follows the decisions of the Interstate Commerce Commission and the present practice* and has put in form of law what had been enunciated as proper practice." * * * (Report No. 456, page 17, 65th Cong. 2nd Sess.)

"Paragraph (12) of the amended section incorporates in the statute a rule laid down by the commission and upheld by the Supreme Court as to just and reasonable distribution of coal cars among the mines, THUS AVOIDING ANY POSSIBILITY OF THE RECURRENCE OF THE EVIL OF WHAT IS KNOWN AS 'ASSIGNED CARS.'" (Report No. 456, page 27, 65th Cong. 2nd Sess.)

The statement of the committee that it follows the decisions of the Interstate Commerce Commission has been seized upon by counsel for defendant to show that Congress intended to adopt the rule in the *Traer* case. But it will be observed that the committee also states that the bill follows the "present practice." There is an obvious error here. The "present practice" and the rule laid down by the decisions of the Commission were two entirely different things. The bill could not have followed both of them. The decisions of the Commission authorized the use of assigned cars for railway fuel. The "present practice,"—that is to say, the practice of the Railroad Administration at the time the bill was reported and until it was adopted, forbade the use of assigned cars for railway fuel.

The source of this mistaken identification of the practice of the Railroad Administration with that sanctioned by the decisions of the Commission, as well as a clear

indication of the real purpose of the committee, is to be found in the following colloquy between Chairman Esch of the committee and Chairman Clark of the Commission, which took place in the course of the hearing on the bill:

"The Chairman: Mr. Clark, are you familiar with the provision inserted in the Cummins bill with reference to coal car distribution? They have a section devoted to it.

Mr. Clark: I remember there is such a section, but at the instant I do not recall the particular provision.

The Chairman: *It seeks to carry into the law the orders of the Director General now with reference to car distribution.*

Mr. Clark: That leads me to say that in the earlier days of the Railroad Administration this very question of refraining from counting against the distributive share of the mine the cars that were sent for the carriers' own fuel supply came up. Some members of the Director General's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. *My understanding is that the rule adopted was based upon the principles laid down by us*, and that they are following the practice of counting those cars against the distributive shares of the mines.

The Chairman: You would be in favor of legislation of that kind being incorporated in any bill, so as to make it a statutory matter and not really a matter of regulation?

Mr. Clark: I can see no objection to it, although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The Chairman: The idea expressed by the representative of the coal association was that when Federal control ended there might be a recurrence to the old practice?

> Mr. Clark: Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I cannot see any possible objection to carrying it into the statute."
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> Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives on Return of Railroads to Private Ownership, pp. 2926-2927.

Chairman Esch and Chairman Clark were obviously at cross purposes in this colloquy. But it is perfectly clear that Chairman Esch considered the provision under consideration to be based on the "present practice," and he referred in his report to the decisions of the Commission only because Chairman Clark had erroneously informed him that the "present practice" followed those decisions.

That the committee was quite clear as to the purpose of incorporating the car shortage provision in the bill, however confused it may have been as to the precedents for its action, is further evidenced by the statement of Chairman Esch that the effect of the provision would be to avoid "any possibility of the recurrence of the evil of what is known as 'assigned cars.'"

Counsel for defendant have attempted to explain this language as referring to the evil of the assigned car practice as it existed prior to 1907, when the Commission established the rule in the *Traer* case, and this is the only possible explanation which will reconcile it with their theory that paragraph (12) was intended to embody that rule. But why should Congress propose in 1919 to legislate against an evil which had not existed since 1907? The return of the carriers to private control involved many grave problems of immediate ur-

gency. It would have been a singularly inept proceeding for Congress to turn aside from the consideration of those questions and devote a paragraph in the Transportation Act to prohibiting a practice of the carriers in coal car distribution which had been suppressed by the Interstate Commerce Commission upwards of ten years before and had never been resumed, and there is no possible ground for supposing that the committee in which the bill was framed was wasting its own time or that of Congress upon a dead issue.

On the other hand, there were notorious evils against which the existing decisions of the Commission provided no protection, and which might naturally be expected to recur immediately upon the return of the railroads to private control,—the evils which we have shown to be the result of the assigned car practice as sanctioned by the decisions of the Commission. It was against these that the Railroad Administration's prohibition of the use of assigned cars for locomotive fuel was directed, and it is too plain for argument that the committee's motive in adopting the practice of the Railroad Administration was to prevent the recurrence of those evils.

The burden of establishing our view of the meaning and effect of paragraph (12) has been sensibly increased by the fact that counsel for defendant were able to produce a public and official expression of the opinion of the Interstate Commerce Commission opposed to that view. The weight which an opinion of the Commission on the interpretation of a provision of the Interstate Commerce Act would naturally have and the importance of the question involved seemed to indicate the propriety of a thorough discussion of its theory as to the meaning of para-

graph (12) and of everything which had been urged in support of that theory, and it is this consideration which has induced us to devote more space to this branch of the argument than its intrinsic difficulty may seem to warrant.

We believe we have shown that the assigned car practice involved injuries of the most substantial and serious character to private rights and to the public interest which imperatively called for legislative interference; that paragraph (12) originated in a deliberate and definite intention to prevent the recurrence of these evils, and that the language of that paragraph is a clear and unambiguous expression of that intention. In the face of this complete and harmonious concurrence of a legislative motive to prohibit the use of assigned cars, a declared legislative purpose to act upon that motive, and a legislative act in pursuance of that motive and purpose, the opinion of the Commission that paragraph (12) does not prevent the use of assigned cars cannot prevail.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PARAGRAPH (15) CONFERRED POWER ON THE COMMISSION TO RELIEVE THE CARRIERS OF THE OBLIGATION IMPOSED BY PARAGRAPH (12), OR TO PRESCRIBE A DIFFERENT RULE OF CAR DISTRIBUTION.

The decree of the Circuit Court of Appeals reversing the temporary injunction granted by the District Court and directing the dismissal of the bill was based entirely on paragraph (15) of Section 1 of the Interstate Com-

merce Act, which is set forth in full in the margin.* The court expressly held, in accordance with the view maintained under Point I of this argument, that paragraph (12) required the distribution of all cars available for transportation of coal in accordance with mine ratings. It also rejected the contention of defendant that even if this was the true construction of paragraph (12), the Commission was authorized to suspend the operation of that paragraph by clause (a) of paragraph (15) which confers power to suspend rules, regulations and practices with respect to car service, and had done so in the notice of April 15, 1920. But it held that this notice was a valid exercise of the authority vested in the Commission by clause (d) of paragraph (15) "to give directions for preference or priority in transportation, embargoes or movement of traffic under

*(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

permits," and that it superseded the car shortage provision of paragraph (12).

That the Court of Appeals was right in holding that the Commission's notice did not conform to the terms of paragraph (12) has, we believe, been fully established. There remain to be discussed the theory of counsel for defendant that the notice was a valid exercise of the power conferred by clause (a) of paragraph (15), and the theory of the Court of Appeals that it was justified by clause (d) of that paragraph.

As we shall show later, the reason given by the Court of Appeals for rejecting the defendant's theory—that the car shortage provision of paragraph (12) is not a rule or regulation within the meaning of clause (a) is undoubtedly sound. But in holding that the Commission's notice was authorized by clause (d), the court overlooked fundamental considerations which we believe to be conclusive against the proposition that any part of paragraph (15) authorizes the Commission to take any action inconsistent with the car shortage provision of paragraph (12).

We contend:

First, that the sole purpose of paragraph (15) is to enable the Commission to control the use by carriers of their equipment and facilities in the movement of freight, for the purpose of preventing or remedying car shortages and congestion of traffic, and that the method of distributing cars among shippers during the existence of a shortage is wholly outside its scope and purpose.

Second. That even if paragraph (15) should be construed as conferring on the Commission authority over the distribution of cars among shippers, such authority does not extend to the making of directions or orders inconsistent with the express statutory requirement of paragraph (12).

Third. That paragraph (15) should not be construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12) or to give directions inconsistent with that provision, because, if it is so construed, it involves an invalid delegation of legislative power.

Fourth. That the purpose and intent of Congress with reference to the transportation of coal evidenced by the enactment of paragraph (12) will be wholly defeated if paragraph (15) is construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12), or to give directions inconsistent with that provision.

1. Paragraph (15), Section 1 of the Interstate Commerce Act confers upon the Interstate Commerce Commission no authority over the distribution among shippers of the cars available during periods of car shortage.

The theory of the defendant that the Commission was authorized to suspend the operation of the car shortage provision of paragraph (12) by clause (a) involves the proposition that the term "car service" used in clause (a) includes the distribution of cars among shippers.

The theory upon which the Court of Appeals sustained the Commission's order of April 15, 1920, involves the proposition that the phrase "preference or priority in transportation" used in clause (d) includes preference or priority in car distribution as between particular shippers or classes of shippers.

We contend that neither of these propositions can be sustained—that the term "car service" has no reference to the relations between individual carriers and their patrons, and that the expression "preference or priority in transportation" refers only to preference or priority in the use of the equipment and facilities of

the carriers for the movement of freight after it has come into the carrier's possession. These contentions are closely related to each other and will be considered together.

Paragraphs (10) and (11) and paragraphs (13), (14) and (15) of Section 1 are the first five paragraphs of the Esch Car Service Act, approved May 29, 1917 (40 Statutes at Large, 101), with some additions made by the Transportation Act, 1920, and the key to the construction of paragraph (15) and every part of it is to be found in the meaning of the term "car service" and in the reasons which induced Congress to give the Commission jurisdiction over the field which it designates.

The Esch Car Service Act was the direct result of the unusual transportation conditions which arose in the fall of 1916. In some districts the accumulation of cars was so great as to overtax the operating facilities of the railroads, and long delays in transit resulted. In other localities the supply of cars was wholly insufficient to supply the demands of shippers. The Interstate Commerce Commission instituted an investigation as a result of which it found that the principal cause of this condition was the failure of the carriers to observe the Code of Car Service Rules which dealt with the return of foreign cars to their owners.

Car Supply Investigation, 42 I. C. C. 657, 662.

These rules, which are set forth in the Appendix to the Commission's report (42 I. C. C. 679), had no relation to the distribution of cars by the carriers among their patrons. Each carrier dealt with that subject under rules of its own, commonly called Car Distribution Rules. The Code of Car Service Rules was promulgated by The American Railway Association for all the carriers and was concerned exclusively with intercarrier

relations arising out of the movement of freight cars beyond the lines of their owners. It provided for the method of return of such cars to the owning lines and the terms upon which they might be used by the non-owning carrier pending such return.

In view of the general failure of the carriers to observe these car service rules, and the consequent disturbance of transportation conditions the Commission was urged by many of the parties in interest to make an order, and this was finally done. The Commission's report, however, discloses the existence of a serious doubt as to the Commission's jurisdiction in the premises. Three Commissioners declined to concur in the order on the ground that it was beyond the Commission's power, and the majority went no further than to hold that in view of the exigency of the situation, the doubt as to jurisdiction should be resolved in favor of the order. 42 I. C. C. 674.

While this investigation was still pending, the Commission made its annual report to Congress for the year 1916. This report contained an elaborate discussion of the causes of freight car shortages and of the question of jurisdiction involved in the Car Supply Investigation and made the following recommendation (p. 73):

> "From these facts and experiences and a study of these considerations over a substantial period we are led to the conclusion that a reasonable degree of the desired and necessary improvement can be reached within any reasonable time only by vesting power to regulate these questions for all railroads in the appropriate federal body, and also providing means by which rules and regulations promulgated can be enforced. We recommend that the Commission be given definite and specific authority to prescribe for all carriers by rail subject to the act rules and regulations governing *interchange of cars, return of cars to the owning road, the conditions and*

circumstances under which such cars may be loaded on foreign roads, and the compensation which carriers shall pay to each other for the use of each other's cars.''

It was in consequence of this recommendation that the Esch Car Service Act was passed. The first paragraph of the act defined car service as follows:

> ''The term 'car service' as used in this act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this act.''

The second paragraph required the carriers to establish reasonable rules, regulations and practices with regard to car service. The third paragraph authorized the Commission to require such rules and regulations to be published by the carriers. The fourth paragraph authorized the Commission, after hearing, to establish just and reasonable rules, regulations and practices with respect to car service.

The fifth paragraph was as follows:

> ''Whenever the Commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission, and also authority to make such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people.''

It is plain that this statute had no application to the distribution of cars among shippers. In the first place the term "car service" adopted by Congress to describe the subject matter of the legislation had never been applied by the railroads to that branch of railroad activity. It designated only the intercarrier relations covered by the Car Service Rules above mentioned. In the second place, the recommendation of the Commission pursuant to which the act was passed did not refer to car distribution among shippers. It was confined to the precise field designated by the term "car service" in railroad usage. And finally, the regulation of car distribution was wholly beyond the scope and purpose of the act and bore no relation to the end which it sought to accomplish. The method of distributing cars among individual shippers was not a subject of agitation during the emergency which arose in the fall of 1916. If it had been the Commission was fully authorized to deal with it without additional legislation. After the decision by this court in *Interstate Commerce Commission* v. *Illinois Central Railroad Company,* 215 U. S. 452, in 1910, no question had existed as to the Commission's jurisdiction over the rules and practices of the carriers in this field, and in the very report in which the Commission pointed out the necessity of legislation to establish its authority over "car service," *it expressly drew the attention of Congress to the fact that its authority over car distribution was unquestionable.*

Report of Interstate Commerce Commission, 1916, page 72.

It was the distribution of cars among carriers and not the distribution of cars by individual carriers among shippers upon which the attention of Congress was concentrated when the Esch Car Service Act was passed.

The outstanding features of the situation existing in the fall of 1916 were abnormal congestion of equipment in some districts and consequent acute car shortages in other localities. Additional powers were sought by the Commission and granted by Congress to enable the Commission to deal with this and like situations, by compelling the redistribution of cars among the different carriers. In other words the purpose of the Esch Car Service Act was to enable the Commission to prevent or cure car shortages and congestion of traffic by eliminating certain of their causes. The relation between the individual carrier and his patrons during the continuance of a car shortage was wholly beyond its scope.

The car service provisions thus enacted remained in force until the passage of the Transportation Act, 1920, by which they were so amended as materially to increase the scope of the Commission's authority. The definition of car service was enlarged, and in paragraph (15) authority to require the common use of terminals and to exercise a broad control over the movement of traffic was added to the emergency powers originally granted by the fifth paragraph of the Esch Act. But a brief analysis of these amendments will demonstrate that they did not involve any change in the fundamental purpose of the original legislation or bring within its scope anything not directly related to that purpose.

The enlarged definition of car service introduced by the Transportation Act is embodied in paragraph (10) Section 1 of the present statute. It may be conveniently compared with the original definition by setting forth paragraph (10) with the additions made to the original definition printed in italics, as follows:

> "The term 'car service' in this act shall include the *use, control, supply,* movement, distribution, exchange, interchange and return of *locomotives,* cars,

and other vehicles used in the transportation of property, *including special types of equipment and the supply of trains*, by any carrier by railroad subject to this act."

It will be observed that one of the principal purposes of this amendment was to bring within the purview of the statute which, in its original form, included only freight cars, every kind and description of rolling stock used in the transportation of freight, including combinations of different elements of such equipment into trains. This purpose accounts fully for every word added by the amendment except the words "use," "control" and "supply." Manifestly these are not the words Congress would have used to bring car distribution among shippers, a wholly foreign subject, within the statutory definition of car service. Of the three, the word "supply" is the only one which even loosely suggests a reference to the delivery of cars by a carrier to a shipper, and it is perfectly clear that Congress did not use it in that sense in paragraph (10).

In railroad usage, the term "car supply" is used in connection with the stock of cars available to meet the demands of shippers. The apportionment of that stock among the individual shippers is called "car distribution." When the Transportation Act was passed the inadequacy of the "car supply" of the carriers was glaring and notorious. For some years before that time and especially during the period of government control, the increase in the equipment of the carriers had lagged far behind the increase in the demands upon it, and this court had decided in *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, that the Interstate Commerce Commission was without jurisdiction to require a carrier to provide itself with additional equipment. In other words, there existed in 1920 with reference to "car

supply" a situation precisely analogous to that which had brought about legislation with reference to "car service" in 1917—a condition tending to produce car shortage and a lack of power in the Commission to remedy that condition. The obvious course for Congress to adopt was to bring the carrier's duty to supply itself with equipment within the scope of the car service provisions and thus within the Commission's jurisdiction, and this was precisely what Congress did in the Transportation Act.

In paragraph (11) of Section 1, it added to the requirement of the second paragraph of the Esch Car Service Act that the carriers should establish just and reasonable rules, etc., as to car service, the requirement that they should "furnish safe and *adequate* car service." In paragraph (21), Section 1, it authorized the Commission to require any carrier "to provide itself with safe and *adequate* facilities for performing as a common carrier its car service, as that term is used in this act." And in order to bring the statutory definition of car service into harmony with this enlarged conception it added the word "supply" to the definition of car service in paragraph (10).

This conclusion is strikingly corroborated by the testimony of Chairman Clark of the Interstate Commerce Commission at the hearing on the return of the railroads to private control, as to the reason for introducing the word "supply" into paragraph (10). He did not suggest or intimate that it referred to the supply of cars to individual shippers, but after referring to the fact that under existing law the Commission had no authority to compel a carrier to increase its equipment, he pointed out that the addition of the word "supply" to the definition of car service would remedy this defect in jurisdiction, and

enable the Commission to require a carrier to supply itself with locomotives, cars and other equipment.

> Hearings before House Interstate Commerce Committee on Return of Railroads to Private Ownership, pp. 11-12.

We do not overlook the fact that the word "distribution" also occurs in paragraph (10). But it is not one of the added words. It appears in the original definition. In that connection, as we have shown, it refers only to the distribution of cars as between different carriers, and, under the elementary rule of construction applied to language carried over into an amended statute from the original on which the amendment was based, it cannot receive a broader construction in paragraph (10). The very fact that it appears in paragraph (10), and that it is not applicable to the distribution of cars among shippers, strongly emphasizes the inaptness for that purpose of the word "supply" and the other words added by the amendment.

Passing to the consideration of paragraph (15) it is to be observed that the emergency powers which it vests in the Commission are created for the same ultimate purpose as the powers granted by paragraph (11), (13) and (14), namely, to enable the Commission to prevent or cure traffic congestion and shortage of equipment. This is even more explicitly stated in paragraph (15) than in its prototype, the fifth paragraph of the Esch Car Service Act. That paragraph authorized the exercise of the powers it conferred "whenever the Commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property." Evidently Congress considered it advisable to accompany the increase in the emergency powers of the Commission

made by paragraph (15) with a more carefully guarded statement of the conditions which would justify their use, and it therefore substituted for the broad language above quoted, the following,—"whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists," etc. The expression "or other emergency" was doubtless inserted to enable the Commission to forestall threatened shortage of equipment or traffic congestion by dealing promptly with emergencies which might be expected to produce either condition. To give it any broader construction would violate the familiar rule established by the authorities cited, *infra*, that the meaning of a general expression is controlled and limited by the particular expressions with which it is associated.

This view is corroborated by the character of the emergency powers conferred by paragraph (15). Clauses (a) and (b) enable the Commission to substitute temporarily for the routine rules, regulations and practices governing car service, directions appropriate to emergency conditions. Clause (c) authorizes it to require joint or common use of terminal facilities. Clause (d) confers a broad control over the movement of traffic. All of these powers are manifestly appropriate for the purpose of insuring the distribution of equipment among carriers, and the movement of freight, in the manner best calculated to correct equipment shortage and traffic congestion, and the language in which they are granted is fully and satisfactorily accounted for upon the theory that they were designed for that purpose alone.

The opposing view urged by the defendant in the court below, that clause (a) authorized the Commission to suspend the operation of the car distribution provision of paragraph (12) does not require extended discussion here. What has already been said with respect to the

definition of the term "car service" demonstrates that the power to suspend car service rules, regulations or practices granted by clause (a) does not include any authority over the distribution of cars by a particular carrier among its patrons. The same observation applies to the power granted by clause (b) to give directions as to car service.

Clause (d), upon which the Court of Appeals based its decision, is not expressly limited to the field of car service, but the view of the Court of Appeals that it includes car distribution is quite as untenable as that of the defendant with regard to clause (a). Specifically stated, the theory of that court was that the phrase "preference or priority in transportation" includes preference or priority in the distribution of cars by an individual carrier among its patrons. This theory involves the proposition that by this single phrase Congress brought within the drastic emergency powers conferred by paragraph (15) a wholly new matter not in any way related to the purpose for which those powers were granted.

Clauses (a) and (b) do not relate to car distribution among shippers. Clause (c) deals only with the use of terminal facilities. Embargoes and movement of traffic under permits, which are coupled with preference or priority in transportation in clause (d) are not car distribution matters. An embargo, like any other impediment to traffic,—a washout or the destruction of a bridge—might in a particular case serve as an excuse for a carrier's failure to comply with a car distribution rule, but the embargo itself has to do solely with the movement of traffic, and its function is to prevent or relieve traffic congestion.

Hence, if the theory of the Court of Appeals is accepted, we are required to believe that Congress, having

adhered consistently throughout the preceding car service provisions to the plan of granting the Commission such powers as would enable it to prevent or correct car shortage and traffic congestion, suddenly and without apparent reason turned aside in the first half of clause (d) to the irrelevant subject of the distribution of cars by individual carriers among their patrons, and then as suddenly returned to its original plan.

The improbability that Congress intended the phrase "preference or priority in transportation" to include preference in car supply to individual shippers is increased when it is considered that the authority granted by paragraph (15) may be exercised without notice or hearing. The Esch Car Service Act had set the precedent for granting this unusual and extraordinary power in connection with certain intercarrier relationships and its extension to other intercarrier relations in paragraph (15) was a logical development of the legislative policy of the original act. The extension of the same power to the carrier-shipper relationship involved in car distribution is a wholly different matter. If the provisions of paragraph (15) are confined to intercarrier relationships, the possibility of injury and injustice from improvident orders made without hearing is minimized by the provision for subsequent hearings to determine questions of compensation as between the parties affected. That it would be practicable to extend any such protection to the shipper is not clear. In any event there has been no attempt to do so. If the relation of the shipper to the carrier which serves him is within paragraph (15), the shipper is without protection against the making of an order affecting that relation, and without remedy when the order has been made.

We shall not discuss at this time the interesting question of the power of Congress to subject carrier-shipper

relations to administrative control of this character. We do assert, however, that if Congress had intended to subject them to any such control, it would not have done so except upon grave consideration and in express and unmistakable terms. It certainly has not done this in paragraph (15). "Preference or priority in transportation" does not designate car distribution nor distinguish it from any one of the numerous activities that may conceivably be covered by the word transportation. To hold that it was used for the purpose of bringing that subject within the scope of the extraordinary powers granted to the Commission by paragraph (15) is to ascribe to the proceedings of Congress in the premises an extremely casual character.

We submit that it is quite unnecessary and therefore wholly improper to attribute such haphazard and inconsequent conduct to Congress. The natural and logical view is that "preference or priority in transportation" is complementary to "embargoes" the latter representing an impediment and the former a stimulant to the movement of traffic. So construed clause (d) takes its proper place in the legislative scheme for the prevention and cure of traffic disturbance. Construed in accordance with the decision of the Court of Appeals, it represents an inexplicable departure from that scheme.

The doctrine that general expressions in a statute are to be given the specific meaning indicated by their context, and by the purpose for which the statute was enacted, is a firmly established canon of statutory interpretation.

In *Neal* v. *Clark,* 95 U. S. 704, the question arose whether constructive fraud was a bar to the discharge of a bankrupt under the section of the bankruptcy law of 1867 which provided that "no debt created by fraud or embezzlement of the bankrupt or by defalcation as a

public officer or while acting in a fiduciary capacity shall be discharged under this act." This court held that the association of the words fraud and embezzlement required the conclusion that Congress had in mind only fraud involving moral turpitude, and that constructive fraud was therefore not within the statute. Mr. Justice Harlan stated the applicable rule of construction as follows (pages 708-709):

> "It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' In Broom's Legal Maxims, p. 450, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*,—the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure * * * the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words.' The same author says (p. 455): 'In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject matter.'"

In *United States* v. *Stever*, 222 U. S. 167, Sec. 3894 of the Revised Statutes was before the court for construction. It forbade the use of the mails to carry letters, postal cards or circulars "concerning any lottery, so-called gift, concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money under false pretenses."

An indictment in two counts, each of which set up the use of the mails to obtain money under false pretenses not connected with any lottery or similar scheme had been returned. One of these counts was predicated upon the section above mentioned and the other upon Section 5480.

It was contended upon the part of the United States that the fraud set forth in the indictment was a scheme "devised for the purpose of obtaining money or property under false pretenses" within the meaning of Section 3894. This contention was rejected by the court upon the ground that the context demonstrated that the statute was directed against the use of the mails to promote lotteries and other like enterprises, and the general language relied upon by the government must be restricted to schemes of that character.

The court said (page 174):

"The two sections are intended to prevent the use of the mail for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being 'any scheme or artifice to defraud.' A scheme to defraud by means of false pretenses is, as we have seen, 'a scheme or artifice to defraud,' within the plain meaning and purpose of this section. *The general words, or concerning schemes devised for the purpose of obtaining money or property under false pretenses,' found in* § 3894, *do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General.* So construed, they would trench upon the ground covered by § 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance, and are followed by further particular words relating to the same kind of lottery schemes.

In such circumstances, *unless there is a clear manifestation to the contrary, general words, not*

specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words."

In the recent case of *United States* v. *Salen*, 235 U. S. 237, the question was as to the sufficiency of an indictment for making a false statement in the declaration required of an importer by the Tariff Act of 1909. The statute prescribed the form of the declaration and required the bill of lading, consular invoice and entry list of the goods to be attached to it.

All of the statements in the required form of declaration referred expressly to the annexed documents except one, namely, that nothing had been suppressed by the importer or by any other person to his knowledge whereby the United States might be defrauded of duties. The indictment charged that the declaration was false in that the importer had suppressed facts regarding previous importations from the same foreign consignor which if disclosed would have awakened the suspicion of the collector as to the invoice valuation of the goods to which the declaration related.

The court held that the indictment stated no offense for the reason that statement as to suppression of facts required by the statute must be held to refer only to facts connected with documents required to be annexed to it.

Mr. Justice Lamar said (page 249):

"To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter, would be *to suddenly depart from the particular to the general and back again from the general to the particular;*—from the particular subject of documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wide and indefinite scope and—in the seventh clause—again to return to the particular subject of documents. Such an interpretation would

> give an exceedingly liberal construction to a statute defining a felony. *It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class.*"

See also, to the same effect,

Virginia v. *Tennessee*, 148 U. S. 503, 519.

The doctrine of these cases is peculiarly applicable to the car service provisions of the Interstate Commerce Act. The purpose and scope of the original car service act is capable of unusually exact definition. It cannot possibly be contended that the distribution of cars among shippers was within it. The present car service provisions preserve the form and structure of the original act, and all of its substantive provisions. There is nothing in the additions made by the Transportation Act which suggests any change in the original purpose of the legislation. On the contrary, their general tenor clearly demonstrates that what Congress had in mind was simply the creation of additional means for the accomplishment of that purpose.

In these circumstances we insist that particular expressions which, standing alone, might be capable of a broader meaning, must, under the rule stated in the cases cited, be construed in a manner which will bring them into harmony with their context and with the governing purpose of the statute.

2. Even if paragraph (15) should be construed as conferring upon the Commission authority to give directions as to the distribution of cars among shippers, such authority cannot be held to extend to the giving of any direction inconsistent with the express statutory requirement of paragraph (12).

The theory that the Commission's notice of April 15, 1920, may be justified as an exercise of a power conferred by paragraph (15) involves holding not merely that car distribution among shippers is within the scope of that paragraph, but also that directions as to car distribution given under paragraph (15) are controlling even though they are squarely in conflict with an express statutory provision.

The second of these propositions cannot be deduced from the first. Even if the court should be of the opinion that paragraph (15) confers power over car distribution it does not follow that it authorizes the Commission to exercise that power in total disregard of statutory provisions relating to the same subject matter. On the contrary, we contend and shall maintain in this division of the argument, that there is not the slightest indication in paragraph (15) of any intention on the part of Congress to authorize the Commission to suspend the operation of any statutory provision or give any direction in conflict with the terms of such a provision, and that even if it confers power over the distribution of cars among shippers in general that power is subject and subordinate to the car shortage provision of paragraph (12).

Discretionary powers vested in an administrative body are always subject to all limitations imposed by the will of the legislature, and these limitations are to be found not only in the specific terms in which the power is granted, but in all substantive statutory provisions af-

fecting the subject matter of the grant. This restriction is inherent in the very nature of administrative discretion to make rules and regulations or issue orders or directions. Such discretion exists only to further the purpose of legislative acts by filling in the details for which the legislature has not specifically provided. In so far as the will of the legislature as to a given subject has been specifically declared, there is neither occasion nor opportunity for the exercise of discretionary authority of an administrative character. Hence a specific mandate of the legislature will always override a general grant of administrative power even though the terms of the latter may include the subject matter of the former.

This doctrine was succinctly stated in the case of *United States* v. *Symonds*, 120 U. S. 46, in which the court held that an order of the Secretary of the Navy was invalid for the reason that it was in conflict with an Act of Congress. The court said (at page 49):

> "The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, *necessarily implied*, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot* v. *United States*, 4 How. 80, and *Ex parte Reed*, 100 U. S. 13, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith* v. *Whitney*, 116 U. S. 181. In neither case, however, was it held that such

regulations, when in conflict with the acts of Congress, could be upheld."

This general principle is so elementary and so well established that it is unnecessary to multiply citations in support of it. The following are a few of the cases in which it has been held that a power vested in an administrative officer to make rules or regulations will not be construed to include a power to alter or amend a statute or destroy a statutory right:

Morrill v. *Jones*, 106 U. S. 466.
United States v. *United Verde Copper Company*, 196 U. S. 207.
Williamson v. *United States*, 207 U. S. 425.
United States v. *Grimaud*, 220 U. S. 506.

That this rule controls the construction of provisions of the Interstate Commerce Act granting discretionary powers to the Commission does not admit of doubt. Its application has been fully recognized by the Interstate Commerce Commission and by this Court in the cases arising under Section 4 of the act.

That section as amended in 1910 forbade any carrier subject to the Act to charge a greater compensation for a shorter than a longer haul of persons or property, the shorter distance being included within the longer, but provided "that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

This amended section came before the Commission in *Railroad Commission of Nevada* v. *Southern Pacific Co.*

21 I. C. C. 329, and the Commission held that in spite of the broad and unqualified language in which Congress had conferred the authority to relieve carriers from the operation of the section, it must be held that there was incorporated in Section 4 "every standard set up by Congress as a guide to this Commission which is to be found in any section of the Act." It stated its conclusion as to the extent of its power under the proviso as follows (page 341):

> "That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but *its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and* IN NOWISE ANTAGONISTIC TO OTHER PROVISIONS OF THE ACT."

And the Commission therefore held that in passing upon an application by a carrier for relief from the operation of the fourth section it was bound by the prohibition of the third section against undue preferences.

The carriers sought to enjoin the Commission from enforcing the order made in that case, and the question of the construction of the fourth section eventually came to this Court, which sustained the view taken by the Commission and held that the authority of the Commission under the fourth section was limited by the provisions of the third section. *Intermountain Rate Cases*, 234 U. S. 476.

These cases are controlling upon the question of the construction of paragraph (15). The power given to the Commission to authorize carriers to charge less for a longer than for a shorter haul is conferred in language quite as absolute and unqualified as that in which paragraph (15) confers authority to give directions, and there is no material or essential difference between para-

graph (12) and Section 3. Both prescribe rules of conduct for the carriers and make the violation of such rules unlawful. If the Commission is not authorized by the unqualified grant of authority contained in Section 4 to relieve the carriers from the obligation to obey the mandate of Section 3, it necessarily follows that paragraph (15) does not authorize it to set aside the requirement of paragraph (12).

It is true that Section 3 prescribes a rule of conduct applicable generally to all the activities of the carriers, whereas the rule embodied in paragraph (12) is specific and applies only to a particular activity. But this difference is wholly immaterial when the question of the statutory restrictions on the Commission's power is under discussion. It is not usual for Congress to interest itself in the details of the rules controlling the practices of the carriers, but the fact that it has been the legislative practice to leave such matters to the discretion of the Commission does not impair the authority of Congress to withdraw such discretion or restrict it, and when it exercises that authority by enacting a specific car distribution rule, the rule becomes as much a part of the statutory system for the regulation of commerce as any other substantive provision of the act, and quite as binding on the Commission.

The Court of Appeals has not discussed the question of the construction of clause (d) from this viewpoint. The entire reasoning of the court upon this question is contained in the following excerpt from its opinion (Pr. Rec., 129):

> "Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation and unexpected needs of the public which cannot be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had

guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that 'whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.' "

It will be observed that the court infers the existence of the power to suspend the operation of paragraph (12) solely because, as it says, "Congress could not have intended to guard the private interests of the mines by an inflexible enactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it."

It is, we submit, somewhat remarkable that the court could see nothing in paragraph (12) but a purpose to guard "the private interests of the mines," when it appears without contradiction upon the record in this case that one of the primary reasons for the abandonment by the Railroad Administration of the use of assigned cars for railway fuel was the indisputable fact that the practice resulted in transferring to the rest of the consuming public a financial burden amounting to scores of millions of dollars which should be borne by the rail-

roads. In the face of this fact, how can it possibly be assumed that the action of Congress in adopting paragraph (12) was dictated solely or even principally by a tenderness for the private interests of the coal operators?

This erroneous assumption on the part of the court is alone sufficient to vitiate its conclusion as to the meaning of clause (d). Assuming that Congress might have considered it warrantable to provide against "unforeseen contingencies" which might prove injurious to the public welfare, by enabling the Commission to suspend a statute which protected merely private interests, it by no means follows that the same motive would induce it to entrust to the Commission or any other agency of Government, the power to reinstate the assigned car practice. Indeed, as between the gross and palpable public injury caused by that practice, and the vague category of "unforeseen contingencies" referred to by the court, Congress might well prefer to incur the chance of the latter rather than the certainty of the former.

The fundamental objection, however, to the court's view as to the probable intention of Congress is that it is irrelevant. The attitude of the court toward the construction of clause (d) bears a close resemblance to that of the Commission toward paragraph (12). Having arrived at the conclusion that some provision ought to have been made for a relaxation of the rule of paragraph (12) to provide against unforeseen contingencies, it assumes that Congress made such a provision.

There is nothing in the language of the statute which lends any color to this assumption. There is no suggestion in paragraph (12) of any intention to permit any relaxation of the rule which it prescribes. On

the contrary it is evident that Congress regarded the strict observance of the rule as of peculiar importance since it took the unusual step of attaching a specific and severe penalty to its violation. Nor would it help the case to adopt the view taken by the Court of Appeals that the language of clause (d) includes car distribution since, as we have shown, that language is subject to the condition "necessarily implied" that it must be exercised within the restrictions imposed by paragraph (12).

The rule of construction which requires this condition to be implied in a grant of discretionary authority to an administrative body is neither technical nor arbitrary. It is the application of common sense to the problem of ascertaining the legislative intention. Congress takes for granted, and it is entitled to take for granted, that the agencies which it creates to carry out its enactments will accept its mandates as conclusive. To require it to qualify every general grant of administrative authority with provisos and exceptions to prevent the delegated authority from being exercised in derogation of statutory provisions would be absurd. It follows that every substantive statutory requirement must be regarded as binding on agencies of the government exercising merely administrative authority, unless the contrary intention is clearly and specifically expressed.

That Congress does in fact proceed upon this theory is amply shown by the Interstate Commerce Act itself. In Section 4, to which reference has been made already, the prohibition against making a greater charge for a shorter haul than for a longer haul is coupled with a proviso explicitly authorizing the Commission in special cases to relieve the carrier from the operation of the prohibition.

Paragraph (2) of Section 3 prohibits carriers sub-

ject to the Act from relinquishing possession of freight at destination until all tariff rates and charges have been paid "except under such rules and regulations as the Commission may from time to time prescribe," etc.

Paragraph (9) of Section 5 prohibits any common carrier subject to the Act from owning, controlling or having any interest in any competing common carrier by water, and paragraph (11) expressly confers upon the Commission power to authorize the continuance of service by a common carrier by water so owned or controlled and not operating through the Panama Canal, if in its opinion such operation will not prevent, exclude or reduce competition on the water route in question and is in the public interest.

Paragraph (3) of Section 6 prohibits any change in published rates except upon thirty days' notice to the Commission and the public, "provided that the Commission may in its discretion for good cause shown allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting or filing of tariffs either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

Paragraph (8) of Section 15 confers on the shipper the right to designate the through route by which his property shall be transported "subject to such reasonable exceptions or regulations as the Interstate Commerce Commission shall from time to time prescribe."

The foregoing does not exhaust the category of provisions of this character which may be found in the Interstate Commerce Act, but it is amply sufficient to show that when Congress desires to entrust the Commission with a discretion to make exceptions to a substantive provision of the statute, it takes care to do so in explicit and unmistakable terms either by way of a proviso or an ex-

ception incorporated in the provision itself or, as in the case of the provision as to the control of competing water carriers, by a separate clause referring specifically to the subject matter of that provision. And it is not only the natural but the necessary inference from the fact that no such exception was incorporated in paragraph (12) and no specific grant of power to relieve from its operation appears in any separate provision of the statute, that Congress did not intend to entrust any discretion to the Commission to relieve the carriers of the obligation to apply mine ratings which it imposed.

The course pursued by Congress in connection with Section 5 of the Interstate Commerce Act is peculiarly instructive in this connection. Prior to the adoption of the Transportation Act, paragraph (1) of Section 5 provided,

> "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof."

On June 2, 1919, a bill to amend the Interstate Commerce Act was introduced in the House of Representatives (H. R. 4378), and the amendments proposed in this bill were in the main ultimately incorporated with some changes in the Transportation Act of 1920. This bill provided that Section 5 should be amended so as to permit pooling agreements to be authorized by the Interstate Commerce Commission in certain contingencies. The language of the amended section so proposed was in part as follows:

> "That except upon specific approval by order of the Commission as in this section provided it shall

be unlawful for any common carrier subject to this act to enter into any contract," etc.

When the legislation for the return of the railroads to their owners assumed its final form in the conference committee of the House and Senate there had been added to the amendments to Section 1 of the Interstate Commerce Act originally proposed by the House Bill above referred to, the provision which now appears in the Interstate Commerce Act as paragraph (16) of Section 1, immediately following the paragraph of which clause (d) is a part.

Paragraph (16) reads as follows:

> "Whenever the Commission is of opinion that any carrier by railroad subject to this act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

Obviously the exercise of the Commission's authority under this paragraph would require the carriers affected to enter into negotiations looking to agreements of the character prohibited by paragraph (1) of Section 5. Upon the theory adopted by the Court of Appeals with regard to clause (d) of paragraph (15), the enactment of paragraph (16) would of itself exempt the agreements which it contemplated from the operation of Section 5, just as the Court of Appeals held that the enactment of Clause (d) exempted the directions made by the Commission from the operation of paragraph (12).

Congress, however, did not proceed upon this theory, for when it introduced paragraph (16) into the bill, it further amended paragraph (1) of Section 5, and in the bill as reported from conference and finally adopted that section read as follows:

> "That except upon specific approval by order of the Commission as in this section provided, and *except as provided in paragraph* (16) *of Section* 1 *of this act,* it shall be unlawful for any common carrier subject to this act to enter into any contract, agreement, or combination," etc.

Paragraphs (12), (15) and (16) of Section 1 and the amended paragraph (1) of Section 5 were all parts of the same legislative act, and the inference is irresistible that if Congress had intended paragraph (15) to authorize the giving of directions which would infringe on the mandate of paragraph (12) it would have added to the latter paragraph a proviso or exception expressly exempting from its operation directions given under that clause.

Under the authorities we have cited and in the light of the uniform practice of Congress in conferring discretionary power on the Commission to make exceptions to statutory rules as shown by the instances above referred to, the absence of any express grant of such power, either by way of an exception or proviso incorporated in paragraph (12) or by specific language in paragraph (15) is entirely inconsistent with the view that Congress intended paragraph (15) to authorize the making of directions which would infringe on the rule prescribed by paragraph (12), and it was not competent for the Court of Appeals to supply the omission of Congress to confer this authority.

The cases cited as to the construction of paragraph (12) under Point I of this Argument (*supra,* pp. 41-44) are clearly in point upon this proposition, and the follow-

ing language used by this court in *Bate Refrigerating Company* v. *Sulzberger*, 157 U. S. 1, at page 36, is also peculiarly applicable:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden* v. *Collector*, 5 Wall. 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * *It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.*' *Scott* v. *Reid*, 10 Pet. 524, 527."

Counsel for defendant appear to have been conscious of the instability of a position founded on the doctrine that a mere administrative authority to give directions included the power to override statutory provisions, and in the court below they vigorously insisted that power to suspend the operation of the car shortage provision of paragraph (12) was expressly conferred by clause (a) of paragraph (15), which authorizes the Commission to suspend rules, regulations and practices with respect to car service.

One fatal objection to that contention we have already pointed out—namely, that the term "car service" has no reference to the distribution of cars among shippers. Another obvious and equally fatal objection is that

paragraph (12) is not a rule or regulation nor is the course of conduct which it prescribes a practice within the meaning of those expressions as used in clause (a).

This view was succinctly stated by the Court of Appeals as follows (Pr. Rec. 128):

> "Rules, regulations and practices mean the rules, regulations and practices adopted by the Commission or by the railroads in conformity to the act or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from Subdivisions 11 and 14 of the same section and other portions of the statute. If therefore the order of the Commission had no other basis than the authority conferred to suspend rules, regulations and practices it would be without support."

In view of the reference made by the court to portions of the statute other than paragraphs (11) and (14) of Section 1, it seems not irrelevant to point out in this connection that although there are upwards of thirty-five instances in which one or more of the terms used in clause (a) occur in the Interstate Commerce Act, the words "rule" or "regulation" are never used to designate a statutory mandate, nor is the word "practice" ever applied to a course of conduct required by a statutory provision. In Section 13 reference is twice made to any "regulation or practice" made or imposed by the authority of a state or initiated by the President during federal control. In Sections 15 and 26, "laws or regulations applicable to transportation by water" are mentioned. In every other instance the terms "rule," "regulation" and "practice" clearly and unmistakably designate rules, regulations or practices established or to be established either by the carriers or by the Commission.

In order to fix the meaning of clause (a), however, it is unnecessary to go beyond the paragraphs of Section

1 relating specifically to car service which immediately precede it. Paragraph (11) provides that it shall be the duty of the carriers "to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service." Paragraph (13) authorizes the Commission to require the carriers to file with it and to incorporate in their rate schedules, their "rules, regulations and practices with respect to car service," and paragraph (14) authorizes the Commission to establish "reasonable rules, regulations and practices with respect to car service."

Paragraph (15) immediately follows, and it is plain that when clause (a) of that paragraph authorized the Commission to suspend "any or all rules, regulations or practices then established with respect to car services," it referred to the rules, regulations and practices specifically mentioned in the three paragraphs from which we have quoted and to nothing else.

This conclusion does not depend solely upon the inference that identical phrases have identical meanings, irresistible as that inference is in a case like the present. It is the only escape from a conclusion as to the legislative intention which is manifestly absurd. Paragraph (11) contains not only the requirement that the carriers shall establish rules and regulations with respect to car service, but the direct legislative mandate that they shall furnish safe and adequate car service. If the car shortage provision of paragraph (12) is a rule or regulation with respect to car service within the meaning of clause (a), so is this requirement of paragraph (11). Indeed the requirement of paragraph (11) that the carriers shall establish just and reasonable rules, regulations and practices is itself a statutory rule with respect to car service. In other words, counsel's claim that the Commission

was authorized by clause (a) to suspend the operation of the car shortage provision of paragraph (12) necessarily involves the conclusion that it is also authorized to suspend the operation of paragraph (11). It cannot seriously be argued that Congress intended to grant any such power, but the only alternative to holding that "any or all" statutory provisions relating to car service are subject to clause (a) is to hold that all are excluded from its operation.

3. Paragraph (15) should not be construed as confering power on the Commission to dispense with the car shortage provision of paragraph (12) or to establish another rule in its place, for the reason that if it is so construed, it involves an invalid delegation of legislative power.

The authority to deal with the car shortage provision of paragraph (12) which both counsel for defendant and the Court of Appeals attribute to the Commission is legislative in character, and if paragraph (15) is construed as conferring such authority, it is to that extent unconstitutional.

The extent to which the operation of a law, or the suspension of its operation, may be made to depend upon executive or administrative action was exhaustively considered in *Field* v. *Clark*, 143 U. S. 649. In that case the validity of a statute vesting in the President the power to issue a proclamation suspending the operation of certain provisions of a revenue act was questioned on the ground that it amounted to a delegation of legislative authority. In furtherance of the policy of reciprocity in trade with foreign countries the act in question provided for the introduction into the United States of certain articles of commerce without the payment of duty, but

in case any country from which such articles were exported to the United States should impose duties on imports from the United States which the President deemed reciprocally unequal and unreasonable, the statute provided that he should issue a proclamation suspending the operation of the provision permitting the free introduction of imports from that country, and prescribed the duties which should be levied during the period of the suspension.

In holding that this statute was not open to the objection that it delegated legislative power to the President, the court said (page 693):

> "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course, implies that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. *As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named con-*

tingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

The line which the court draws in this case between the legislative discretion which may not be delegated, and the discretion which may be committed to an administrative body is clear and precise. The terms of the law, the conditions upon which its application depend—these are matters for legislative decision. The question whether the conditions upon which the legislature has made the application of the law depend do in fact exist may be left to the determination of another agency of government.

This distinction has been approved and adopted without question or qualification by the subsequent cases in which this question has arisen, and *Field* v. *Clark* may undoubtedly be regarded as having established the limits within which Congress may lawfully make the application of a statute depend upon administrative action.

See

Buttfield v. *Stranahan*, 192 U. S. 470, 496.
Union Bridge Co. v. *United States*, 204 U. S. 364.

That the authority to deal with the car shortage provision of paragraph (12), claimed for the Commission, transcends these limits is manifest. It does not depend upon a finding by the Commission of the existence of facts or circumstances designated by Congress as the con-

dition of its exercise. In substance and effect, it is a power to suspend the operation of the car shortage provision of paragraph (12) and to substitute a different rule whenever the Commission considers such action expedient.

It may be urged that the Commission is required to find the existence of an "emergency" before it can act under paragraph (15). But this is not the finding of a "particular fact" within the rule laid down by *Field* v. *Clark*. Any shortage of equipment is an emergency within the meaning of paragraph (15), if the Commission so considers it. This is the plain meaning of the statute, and, as we have shown, *infra*, pp. 105-106, it is the practical construction given to it by the Commission. A finding by the Commission that an emergency exists, as a preliminary to setting aside the car shortage provision of paragraph (12), is therefore nothing more nor less than a finding that the public interest requires it to be set aside. In other words, if that provision is held to be within the jurisdiction conferred on the Commission by paragraph (15), the effect is precisely as if Congress had expressly declared that its operation should be suspended whenever the Commission in its discretion should so determine.

This, however, is exactly the kind of discretion which, according to the doctrine of *Field* v. *Clark*, Congress must exercise itself and cannot delegate. To prescribe the facts and circumstances in which a law shall be applicable is as much the inalienable function of the legislature as to fix the terms of the law. Congress cannot frame a law and affix a penalty to its violation and then hand it over to a Commission to be enforced or not as that body may think fit.

Yet this is what counsel for defendant claim and the Court of Appeals holds that Congress has done.

The Court of Appeals, in disposing of the case at bar, refused to entertain the question here presented. It said (Pr. Rec., 130):

> "The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff claiming the benefits of the statute cannot assert the unconstitutionality of its limitations. *Daniels* v. *Tearney*, 102 U. S. 415; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17."

As to this method of disposing of the constitutional question, we have to say:

First. The authorities cited by the court are based on the doctrine of equitable estoppel. In each case the party attacking the statute had received *at the expense of the opposing party* a benefit which it was obviously inequitable for him to retain unless he continued to be bound by the statute. No such situation exists in the case at bar. The defendant had no vested right in the assigned car practice, and the plaintiff's right to the benefit of the provisions of paragraph (12) was not obtained at the defendant's expense. The elements of an estoppel are wholly lacking.

Second. The court has completely ignored the fact that the principal importance of the constitutional question presented in this case is in its bearing upon the construction of the statute and not upon its validity. Our main contention is that the statute should not be construed as conferring on the Commission an uncontrolled discretionary authority over the operation of paragraph (12) for the reason that, so construed, it will be unconstitutional. It is no answer to this contention to assume,

as the court does, that the statute is unconstitutional in that particular and then assert that the plaintiff is estopped to attack it on that ground.

If, as we believe we have shown and as the Court of Appeals tacitly admits, Congress had no power to delegate to the Commission this discretionary authority, there is no possible reason for holding that it attempted to do so in paragraph (15). It is one of the most elementary rules of statutory construction that a statute must not be construed so as to render it unconstitutional if any other construction is reasonably possible, (*United States* v. *Delaware & Hudson Railway Company*, 213 U. S. 366, 407), and it cannot possibly be contended that the language of clause (d) so plainly expresses an intention to authorize the giving of directions inconsistent with paragraph (12), as to exclude any other interpretation.

Certainly nothing has been urged in support of the construction of clause (d) as conferring power to give directions inconsistent with paragraph (12) or of clause (a) as conferring power to suspend its operation, which is sufficiently compelling to override the presumption that Congress did not intend to transcend the constitutional restrictions upon its power. Both the Court of Appeals and the defendant agree that it would be highly expedient for the Commission to have authority over the application of paragraph (12). The defendant finds that clause (a) is sufficiently broad to accommodate such authority. The court rejects this view but finds clause (d) more hospitable.

This is the entire argument on the question of the construction of paragraph (15) by the advocates of the unlimited power of the Commission to deal with coal car distribution, and it is manifestly insufficient as against

the proposition that such a construction will make the statute unconstitutional. The absurdity of attributing to Congress an intention to violate the Constitution on grounds of expediency is patent, and it is a settled rule that general language in a statute must be read in the light of the Constitution and that however broad it may be, it cannot be construed as extending to matters beyond the constitutional power of the legislature.

McCullough v. *Virginia*, 172 U. S. 102, 112.

4. The purpose and intent of Congress with reference to the distribution of cars for the transportation of coal would be wholly defeated if paragraph (15) were construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12) or to give directions inconsistent with that provision.

The view that Congress intended paragraph (15) to authorize the Commission to give directions which would have the effect of suspending the car shortage provision of paragraph (12) not only finds no support in the language of the statute, but it is utterly inconsistent with the policy adopted by Congress in dealing with the distribution of coal cars as evidenced by the enactment of paragraph (12).

That Congress attached especial importance to the application of mine ratings during periods of car shortage is evident. The practices of the carriers in regard to the supply of cars to shippers obviously belong to the category of subjects which it has been the policy of Congress, since the creation of the Interstate Commerce Commission, to leave to the discretion of that body, subject only to the general prohibitions against undue preferences contained in Section 3 of the act. The mere fact

that Congress so radically departed from this policy as to enact a specific mandatory rule for the distribution of coal cars during periods of car shortage, is conclusive evidence that its attention had been sharply drawn to that particular subject.

Yet we are asked to believe that having thus unmistakably registered its view that the ratable distribution of coal cars was of such essential importance as to require enforcement by a statutory mandate backed by a specific and severe penalty, Congress proceeded to nullify that mandate by a later provision of the same statute, return to the Commission by paragraph (15) the jurisdiction it had withdrawn by paragraph (12), and for all practical purposes leave the question of coal car distribution exactly where it found it.

That this is the consequence of giving to paragraph (15) the construction placed on it by the Court of Appeals does not admit of doubt. The suggestion of that court that paragraph (12) was intended to provide for what it calls the "usual long existing car shortage," and that paragraph (15) was limited in its operation to shortage "so much beyond the usual as to constitute an emergency" has no basis in the language of the statute. Paragraph (15) expressly provides that "whenever the Commission is of the opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, the Commission shall have and is hereby given authority," etc. There is nothing said here about usual or unusual shortages. It is within the uncontrolled discretion of the Commission to determine that any shortage of equipment requires immediate action, and having so determined, to exercise the authority granted "either upon complaint or upon its own initiative without complaint * * * and with

or without notice, hearing, the making or filing of a report according as the Commission may determine." And the directions which it is thus authorized to give without complaint, notice or hearing are to remain in force "for such periods as it may determine."

We shall waste no time in discussing what may happen to the car distribution rule of paragraph (12) if it is held that the Commission has power under paragraph (15) to prescribe a different rule. Instead we invite the court's attention to what has actually happened since February 28, 1920, the effective date of both paragraphs.

On April 15, 1920, the notice which appears in this record and which substituted the assigned car practice for the rule of pro rata distribution prescribed by Congress in paragraph (12) was issued. This notice remained in force until September 28, 1920, when the Commission substituted a modified notice squarely in conflict with paragraph (12) and still authorizing the use of assigned cars for railway fuel. This modified notice was not revoked until March 24, 1921. During the period of more than eleven months covered by these two notices, the acute car shortage which brought about the original notice ran its course and disappeared, and after a period in the summer during which the usual surplus of coal cars existed, the regular seasonal shortage—for which, according to the Court of Appeals, paragraph (12) was intended to provide—began to develop, reached its maximum and in its turn disappeared.

In other words, within six weeks after Congress had legislated "to prevent the possibility of the recurrence of the evil of assigned cars," their use was resumed with the sanction and encouragement of the Commission, and continued uninterruptedly with all the concomitant and resulting evils which Congress had been so solicitous to

prevent, during all the stages of two successive car shortages.

This practical construction by the Commission of its powers under paragraph (15) is far more convincing and logical than the distinction attempted by the Court of Appeals between usual and unusual car shortages. In the view of the Commission, any coal car shortage whether local or general, whether it is in its mild early autumnal stage, in its acute midwinter stage, or moribund with the approach of spring, is an emergency which justifies the use of assigned cars, and if the distribution of coal cars during periods of shortage is within the scope of paragraph (15) at all, the Commission's opinion is conclusive.

But we submit that this view of paragraph (15) leaves Congress in an absurd position. If this was the result which it intended to reach, it might have done so quite as effectively and in a manner far more consistent with its dignity by refraining from the futile gesture which paragraph (12) has so far proved to be.

There may be room for two opposed opinions as to the wisdom of leaving the regulation of coal car distribution to the discretion of the Commission. But it is impossible to give a rational construction to the statute upon the theory that Congress entertained both of those opinions at the same time. That, however, is precisely what is involved in the construction of paragraph (15) upon which the Court of Appeals rested its decision of this case. We are required to believe that having pointedly withdrawn the question from the jurisdiction of the Commission by paragraph (12), Congress immediately provided in paragraph (15) that the Commission should have unlimited power to determine whether that withdrawal should have any effect.

III.

THE PLAINTIFF IS ENTITLED TO RELIEF IN EQUITY EITHER IN A STATE OR FEDERAL COURT AGAINST THE CONTINUED VIOLATION BY APPELLEE OF THE CAR SHORTAGE PROVISION OF PARAGRAPH (12) AND THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE TEMPORARY INJUNCTION AND ORDERING THE DISMISSAL OF THE BILL.

The bill of complaint in this case alleged the existence of a car shortage, and claimed that during its existence defendant was bound under paragraph (12) to distribute the available cars among the mines served by it, including the plaintiff's mine, on the basis of their ratings. It also alleged that the defendant had violated paragraph (12) by failing and refusing to furnish the plaintiff with its full ratable proportion of the available cars, and by furnishing other mines with more than their *pro rata* shares, and that it threatened and intended to continue this unlawful method of distribution and would do so unless restrained by injunction. The bill further alleged that plaintiff had suffered and would continue to suffer irreparable injury by reason of these unlawful acts of defendant, describing in detail the nature of such injuries, and that it had no adequate remedy at law in the premises.

The answer of the defendant denied none of the allegations of irreparable injury, but claimed that the matters alleged in the bill were within the jurisdiction of the Interstate Commerce Commission, that no application for relief had been made to the Commission, and set up the Commission's order of April 15, 1920, as justifying the practice complained of in the bill.

On the motion for the temporary injunction affidavits were filed on behalf of plaintiff supporting all the ma-

terial allegations of the bill and no counter affidavits were filed.

On this record we insist, *first*, that the bill stated a case for equitable relief which was within the jurisdiction of either a state or a federal court, and that the Court of Appeals erred in ordering its dismissal; *second*, that the temporary injunction was properly granted by the District Court and the Court of Appeals erred in reversing it.

1. The Court of Appeals erred in ordering the dismissal of the bill of complaint.

The allegations of the plaintiff's bill show a violation by the defendant of that portion of paragraph (12) Section 1 of the Interstate Commerce Act, which in express terms declares the law applicable to the distribution of coal cars during periods of car shortage, and a resulting injury to the plaintiff. It is well settled that in a case of this character the injured party is not bound to apply to the Interstate Commerce Commission for relief before commencing suit, but may maintain an action either in a state or a federal court without any application to the Commission.

Pennsylvania Railroad Company v. *International Coal Mining Company*, 230 U. S. 184.

Mitchell Coal and Coke Company v. *Pennsylvania Railroad Company*, 230 U. S. 247.

Pennsylvania Railroad Company v. *Puritan Coal Mining Company*, 237 U. S. 121.

Pennsylvania Railroad Company v. *Sonman Shaft Coal Company*, 242 U. S. 120.

Pennsylvania Railroad Company v. *Stineman Coal Mining Company*, 242 U. S. 298.

In *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, a suit was brought for damages suffered by reason of the payment of unlawful rebates by the defendant. The jurisdiction of the court was objected to on the ground that what was claimed to be a rebate was in fact merely a differential between the rates on free and contract coal, and that whether this distinction between free and contract coal was reasonable, was a question for the Commission to determine in the exercise of its administrative jurisdiction. On this point the court said (pages 196-197):

"None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, Sec. 2; March 2, 1889, 25 Stat. 855, c. 382, Sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) *The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute*, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discre-

> tion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. *The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class.* This departure from the published tariff was forbidden, and Sec. 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation, together with reasonable attorneys' fees.' "

This case was cited and its doctrine restated and approved in *Mitchell Coal Company* v. *Pennsylvania Railroad Company*, 230 U. S. 247, which also involved a claim for damages caused by a departure from the published tariff. The court said (p. 257):

> "There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice."

In *Pennsylvania Railroad Company* v. *Puritan Coal Company*, 237 U. S. 121, there was a writ of error to reverse a judgment of a state court for damages suffered by the plaintiff by reason of the defendant's failure to furnish it with the share of cars for the transportation of coal, to which the plaintiff was entitled under the car distribution rules of the defendant. The defendant objected to the jurisdiction of the state court on the ground, *first*, that the question involved was one which called for the exercise of the administrative power of the Commission, and, *second*, that the suit was one for damages for unjust discrimination and could not be brought except in a court of the United States. The court summed up its position on these questions in the following language (page 131):

> "There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9.
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occa-

sioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts."

The same question was discussed later in *Pennsylvania Railroad Company* v. *Sonman Shaft Coal Company*, 242 U. S. 120, which also involved a judgment of a state court for damages suffered by reason of a failure to furnish cars for transportation of coal. The court said (pages 123-124):

"It is true that Sections 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that Sections 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for Section 22 contains this important provision. 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision in Section 22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced (*Texas & Pacific Ry. Co.*

v. *Abilene Cotton Oil Co.* 204 U. S. 426, 446-7); that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R. R. Co.* v. *Puritan Coal Co.* 237 U. S. 121, 129; that *the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission,* or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, ibid. 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission, *ibid.* 131-132; and that, *if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a federal or a state court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of* 1906 *or of the duty prescribed by the act, ibid.* 132-135; *Eastern Ry. Co.* v. *Littlefield,* 237 U. S. 140, 143; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.* 238 U. S. 275, 283; *Pennsylvania R. R. Co.* v. *Clark Coal Co.* 238 U. S. 456, 472."

It will be observed that the decision in all of these cases turns on the question whether the case involves an exercise of the administrative discretion of the Commission. If the damages are alleged to be the result of an unjustly or unreasonably discriminatory practice, the

courts will not entertain the claim, since it has been established that the Commission has exclusive original jurisdiction to pass on the question whether a practice is open to the charge of being unreasonably discriminatory. But if the wrongful act complained of is a violation of a specific prohibition of the statute not involving the standard of reasonableness, so that the courts may determine the issue presented without invading the administrative province of the Commission, either a state or a federal court has jurisdiction.

This distinction is aptly illustrated by the provision of the act in question in this case. Paragraph (12) requires the carriers "to maintain and apply just and reasonable ratings" of the mines served by it. Clearly if a shipper complains that the rating of his mine does not comply with the statutory requirement that it shall be just and reasonable, the claim presents an administrative question. The courts will not undertake to determine the justice or reasonableness of the rating, and for a decision on that point the shipper must apply to the Commission. But if there is no complaint of the rating, and the sole question is whether the carrier has applied it as the statute requires, there is no occasion for the exercise of administrative discretion, and the courts will accept jurisdiction without requiring a precedent application to the Commission.

In the case at bar no question is raised as to the justice or reasonableness of the ratings established by defendant. The sole complaint is that the defendant does not apply the ratings in the distribution of the available car supply, and its car distribution rules are attacked, not on the ground that they are unjustly discriminatory, but because they do not comply with the statutory requirement as to the application of the ratings and the counting

of cars, and provide a different method of distribution, thus purporting to authorize an act specifically prohibited by paragraph (12). The determination of the issue thus presented neither requires nor permits the exercise of administrative discretion.

We do not understand that the proposition of law here stated is seriously controverted. The contention of defendant is that it is not applicable to this case, *first*, because paragraph (12) does not require the distribution of cars in accordance with mine ratings, and *second*, because even if it does, paragraph (15) authorizes the Commission to dispense with the requirement of paragraph (12) and prescribe a different rule, and the notice of April 15, 1920, was a valid exercise of that authority.

We believe that what has been said upon this question under Point I of this argument (*supra*, pp. 30-62) demonstrates that the first of these contentions cannot be sustained. It follows that, if paragraph (12) controlled the distribution of cars during the car shortage involved in this case, the claim set up in the answer that the subject matter of this bill was within the administrative jurisdiction of the Commission is untenable, and the suit was properly brought in the Circuit Court of Marion County, West Virginia.

The second contention,—namely, that the notice of April 15, 1920, and not paragraph (12) was the controlling rule, was the basis of the decision of the Court of Appeals. Under Point II of this argument (*supra*, pp. 62-106) we have stated the considerations which, as we believe, lead inevitably to the conclusion that the Commission was wholly without authority to issue this notice. If this conclusion is sound, the action of the Commission clearly could not affect the plaintiff's substantive right to a *pro rata* distribu-

tion of cars as prescribed by paragraph (12) or oust the jurisdiction of the courts to adjudicate that right.

On this point the following language from the opinion of the court in *Pennsylvania Railroad Company* v. *International Coal Company*, 230 U. S. 184, 197, is pertinent:

> "In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. *It could not have been legalized by any proof, nor could the Commission by any order have made it valid.* The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class."

No other grounds have been urged for the dismissal of the bill. Neither in the motion to dismiss, nor in the answer, nor in argument in the District Court or the Court of Appeals was it suggested that the allegations of the bill as to irreparable injury and the lack of an adequate remedy at law were not sufficient to warrant the appellant in proceeding by a bill for an injunction rather than by an action at law for damages, and we apprehend that this question cannot properly be raised for the first time in this court.

Reynes v. *Dumont*, 130 U. S. 354.

Brown v. *Lake Superior Iron Company*, 134 U. S. 530.

Detroit v. *Detroit Citizens' Street Railway Company*, 184 U. S. 368.

In any event, the allegations upon which the appellant bases its claim to equitable as distinguished from legal relief, amply support the claim.

The bill shows that the effect of the decrease in car supply due to the plaintiff's failure to receive its full share of cars, is not only to reduce the amount of coal which it is able to produce and sell and thus directly impair the profits of its business, but to impair its credit and injure the good will of its business by decreasing its ability to supply the requirements of its customers and to fulfill its contracts and by making it necessary to charge an increased price for its coal to absorb the increase in the per ton cost of production which accompanies decreased car supply; that plaintiff loses its more efficient laborers to mines which can offer more regular employment because they receive a preferred car supply, and that those who remain are less loyal and assiduous than they would be if they were enabled to work more steadily; that while defendant suffers these disadvantages, its favored competitors are enabled to keep up production, restrict their unit production cost, maintain and increase the efficiency of their organizations and otherwise gain marked advantages over plaintiff.

It is also alleged that the plaintiff's only remedy at law would be by repeated suits for damages which would involve a multiplicity of suits and great and burdensome expense, and that the injury to its business and good will and the progressively increasing demoralization of its organization cannot be adequately compensated by damages.

All of these allegations are admitted by the motion to dismiss, and we submit that they fully justify the plaintiff's prayer for an injunction.

2. The temporary injunction was properly granted by the District Court and the Court of Appeals erred in reversing it.

The plaintiff's motion for an injunction *pendente lite* was supported by the sworn bill of complaint and by eight affidavits. (Pr. Rec., 6-25, 55-83.) The affidavits sustained all the material allegations of the bill, and the proofs therefore established the fact that the practice of the defendant in car distribution was, at the time of the hearing of the motion causing all the injuries described in the bill, and that their effect upon the property and business of the plaintiff was cumulative, having an increasing tendency to destroy and demoralize it.

No counter affidavits were filed, and if the court had power to grant a temporary injunction, it cannot be contended that the showing made was not sufficient to warrant the exercise of that power. This was in effect admitted both in the District Court and in the Court of Appeals. The only grounds upon which the granting of the injunction was opposed in the District Court or its reversal sought in the Court of Appeals were that the District Court was without jurisdiction of the cause, and that, even if it had jurisdiction, no interlocutory injunction could be granted except after a hearing by three judges, one of whom must be a circuit judge.

We have already sufficiently discussed the first of these objections. The second was of course based on that portion of the Act of October 22, 1913, which provides that "no interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United

States, or by any judge thereof or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge and shall be heard or determined by three judges, of whom at least one shall be a circuit judge," etc.

The Court of Appeals seems to have been under the impression that although the injunction in the case at bar did not mention any order of the Commission, and was directed solely against violations of the statutory car distribution rule of paragraph (12), it was nevertheless within the provision above quoted for the reason that its issuance could not be justified unless the Commission's notice of April 15, 1920, was held void.

This impression is clearly erroneous. The statute refers to an application for an injunction operating directly upon an order of the Commission which, if it were not set aside, or suspended by judicial decree would have some legal operation or effect. The application for the injunction and the injunction in the case at bar were based on the theory that the Commission's notice of April 15, 1920, was void and wholly without legal effect, and that there was therefore no occasion for setting it aside. If, as we contend, the Commission had absolutely no authority to relieve the carriers of the obligation to conform to the car shortage provision of paragraph (12), this theory is manifestly sound. The Commission's notice of April 15, 1920, could not affect the plaintiff's statutory right or impair or alter its remedy. The court was not called upon to set aside an order of the Commission or suspend its operation, but merely to enforce a clear statutory right.

IV.

THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE DECREE OF THE CIRCUIT COURT OF APPEALS.

The case at bar came to the Circuit Court of Appeals on appeal from the order of the District Court granting the interlocutory injunction. That court, being of the opinion that the Interstate Commerce Commission's order of April 15, 1920, was a complete bar to the relief prayed by the bill, followed the practice approved in *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, and other cases, and not only reversed the injunction order but directed the dismissal of the bill. This decree is not made final in the Circuit Court of Appeals by the provisions of the Judicial Code, and as the matter in controversy exceeds one thousand dollars exclusive of costs (Pr. Rec. 38) the case is appealable to this court by the terms of Section 241 of that title.

By Section 128 of the Judicial Code the judgments and decrees of the Circuit Court of Appeals are made final in that court only in cases arising under the patent, trademark, copyright, revenue and criminal laws, and in cases in which Federal jurisdiction is dependent solely on diverse citizenship of the parties.

The case at bar does not fall within any of these classes. The petition for removal upon which the case was removed to the District Court alleges the existence of diverse citizenship as a ground for removal, but it also alleges another ground, in itself sufficient to sustain the jurisdiction of the District Court, namely, that the case necessarily involves the construction of the Act to Regulate Commerce as amended, and the Transportation Act, 1920, and especially of paragraphs 10 to 17 inclusive of Section 402 of the latter act (Pr. Rec. 38-39). It also appears by the bill that the suit requires the construction of paragraph (12) Section 1 of the Interstate Commerce Act, which is identical with paragraph (12) Section 402

of the Transportation Act referred to in the petition for removal.

The jurisdiction of the District Court therefore did not depend on diverse citizenship alone since jurisdiction would have attached regardless of the citizenship of the parties, by reason of the existence of a question arising under the laws of the United States, and as that question does not arise under any of the laws specifically enumerated in Section 128 the decision of the case by the Circuit Court of Appeals is not made final in that court by this section. It is therefore within the express provision of Section 241, which provides for an appeal to this court from any decree of the Circuit Court of Appeals not made final in that court by the provisions of the Judicial Code, when the matter in controversy exceeds one thousand dollars besides costs.

Northern Pacific Railroad Company v. *Amato*, 144 U. S. 465.

Spreckels Sugar Refining Company v. *McClain*, 192 U. S. 397.

Louisville & Nashville Railroad Company v. *Cook Brewing Company*, 223 U. S. 70.

United States Fidelity and Guaranty Company v. *Bray*, 225 U. S. 205.

United States Fidelity and Guaranty Company v. *Bray*, *supra*, presented a situation precisely analogous to that in the case at bar, except that in the Bray case the suit originated in a Federal Court whereas in the case at bar the jurisdiction of the Federal Court was acquired through removal proceedings. In the Bray case the court said, in denying a motion to dismiss the appeal (page 214):

"In the Federal Courts an appeal, as a general rule, lies only from a final decree. But Sec. 7 of the Act of March 3, 1891, 26 Stat. 826, c. 517, as amended April 14, 1906, 34 Stat. 116, c. 1627, establishes an exception by providing for an appeal to the Circuit Court of Appeals from an interlocutory decree

granting or continuing an injunction or appointing a receiver. It was under this section that the appeal to that court was taken, and on that appeal the court was authorized to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and, if there was, to direct a final decree dismissing the bill. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518; *In re Tampa Suburban Railroad Co.* 168 U. S. 583; *Mast, Foos & Co.* v. *Stover Manufacturing Co.* 177 U. S. 485; *Ex parte National Enameling Co.,* 201 U. S. 156. In the exercise of this authority the Circuit Court of Appeals reached the conclusion that the suit could not be maintained in the Circuit Court, and directed both that the injunction be dissolved and that the bill be dismissed. That was a final decree, and as the jurisdiction of the Circuit Court had been invoked not solely upon the ground of diverse citizenship, but also upon the ground that the suit was one arising under the act of Congress whereunder the bonds upon which the complainant was surety were given, a further appeal to this court was rightly allowed under Sec. 6 of the act of March 3, 1891, *supra,* the amount in controversy being in excess of $1,000, exclusive of costs. *Henningsen* v. *United States Fidelity and Guaranty Co.* 208 U. S. 404; *Howard* v. *United States,* 184 U. S. 676, 680."

The fact that the case at bar came to the United States District Court by removal does not distinguish it from the *Bray* case so far as the point here involved is concerned (see *Louisville & Nashville Railroad Company* v. *Cook Brewing Company,* 223 U. S. 70), and it is therefore submitted that the statement of the law above quoted conclusively establishes the jurisdiction of this appeal.

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